"Secular Humanism" and "Scientific Creationism": Proposed Standards for Reviewing Curricular Decisions Affecting Students' Religious Freedom

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INTRODUCTION

Many of the latest skirmishes in the ongoing struggle to maintain public schools' neutrality concerning religion have involved "secular humanism" and "scientific creationism" or "creation science."[1] Some parents, children, and religious leaders assert that public school curricula promote the "religion" of secular humanism and inhibit their own religions,[2] thereby violating the establishment clause and the free exercise clause.[3] These parents, students, and religious leaders view the Darwinian theory of evolution as a primary tenet of secular humanism. Consequently, they contend that their religious freedom is violated when a public school's instruction concerning the origins of the universe and mankind considers only the evolutionary theory. To counter this perceived violation, they maintain that any public school discussion of origins must present scientific evidence supporting the theory of creation, as well as the theory of evolution.[4]

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1. The meaning ascribed to the term "secular humanism" by those who oppose its inclusion in public school curricula is discussed *infra* text accompanying notes 15–30. The background of the terms "scientific creationism" and "creation science" is discussed *infra* text accompanying notes 102–03, and a recent statutory definition of these terms is quoted *infra* note 105. Some public school officials and others who defend the schools' use of material allegedly promoting "secular humanism" reject the term as ambiguous and misleading. *See, e.g.*, Davidow, *"Secular Humanism" as an "Established Religion": A Response to Whitehead and Conlan*, 11 TEX. TECH. L. REV. 51, 55 (1979). Likewise, some who oppose public schools' teaching of "scientific creationism" or "creation science" reject those terms as inaccurate. *See, e.g.*, M. LAFOLLETTE, CREATIONISM, SCIENCE AND THE LAW: THE ARKANSAS CASE 4 (1983) ("[T]he coining of the terms 'creation science' and 'scientific creationism' represent attempts to gain public credibility, a strategy that relies on the relative scientific illiteracy of most Americans."); Davidow & Wilson, *Wendell Bird's "Creation Science"--"Newspeak" in the Assault on the Secular Society*, 9 N. KY. L. REV. 207, 219–23 (1982). The present Article uses these terms simply because they are employed by parties in the ongoing contests about public school curricula. The Article's use of the terms does not imply any view about the accuracy of the meanings that have been ascribed to them by various parties in these disputes.

2. Most of the parties challenging the alleged inclusion of secular humanism in public school curricula appear to espouse fundamentalist Protestant faiths. *See, e.g., infra* text accompanying notes 32, 40, 52–53, 63, 72. *See also* text accompanying notes 101–05.

3. The "religion clauses" of the first amendment provide: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. Both clauses are binding on the states. Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 211–12 (1948) (free exercise); Everson v. Board of Educ., 330 U.S. 1, 15 (1947) (establishment).The two clauses afford interrelated protections to religious liberty, which are to some extent overlapping and to some extent distinctive. *See infra* notes 159, 258. For summaries of Supreme Court decisions interpreting and applying the establishment and free exercise guarantees in the public school context, *see infra* text accompanying notes 145–85, 259–79.

4. For an account of the recent movement to eliminate secular humanism from the public school curriculum, which focuses in part on efforts to balance evolution theory with creation science, *see* D. NELKIN, SCIENCE TEXTBOOK CONTROVERSIES AND THE POLITICS OF EQUAL TIME (1977).

Those who defend public school curricula's inclusion of material allegedly promoting secular humanism contend that it is not a religion, and that its teaching neither advances nor inhibits other religions. Moreover, they assert that the deletion of secular humanism from school curricula, at the instigation of individuals with religious objections to it, would itself violate the establishment clause and other constitutional guarantees. Similarly, those who oppose the inclusion of creation science in public school curricula maintain that its inclusion is not necessary to eliminate any violation of religious liberty, since the exclusive teaching of evolutionary theory does not lead to any such violation. Moreover, they contend that the inclusion of creation science in public school curricula would itself violate the establishment clause, since creation science is a religious theory and not a scientific one.[5]

Although the Supreme Court has generally been reluctant to permit judicial intervention in public school curricula, it has sanctioned such intervention for the specific purpose of eradicating religious influences from the public schools.[6] Therefore, many debates concerning the inclusion of secular humanism and creation science in public school curricula have focused on whether either subject is appropriately classified as religious.[7] However, neither Supreme Court decisions nor scholarly commentary express a cohesive view of how religion should be defined for purposes of the first amendment's religion clauses.[8] This definitional problem reflects a more fundamental conceptual problem: why should religious beliefs be afforded substantially greater protection from government influence than non-religious beliefs? This conceptual problem is particularly troublesome in the public school setting, where freedom of individual conscience is both especially vulnerable and especially important.[9]

In addition to the Supreme Court's somewhat inconsistent rulings concerning the protection of individual beliefs within the public schools, there is another reason why Supreme Court precedents do not provide adequate guidance for resolving curricular disputes concerning secular humanism or creation science. The Court's decisions concerning religious influences in the public schools have stressed that the resolution

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5. The competing views concerning the inclusion in public school curricula of secular humanism and scientific creationism are more fully set out *infra*, Parts I and II.

6. *See infra* Part III.

7. *See, e.g.*, Mitchell, *Whether Secular Humanism is Religion: Analyzing the Legal Argument that Public Schools Violate the Establishment Clause When They Teach Secular Humanism*, 10 NCRPE BULL. 50, 60 (1983) ("Secular Humanism should be considered a religion for Establishment purposes because it offers truly competitive answers to the same ultimate questions that are addressed by traditional religions"); Note, *The Establishment Clause, Secondary Religious Effects, and Humanistic Education*, 91 YALE L.J. 1196, 1216 (1982) [hereinafter cited as Note] ("Secular Humanism is, on balance, arguably nonreligious . . . ; yet because Humanistic Education programs attempt fundamentally to alter the moral orientation of children, they thus are also at least arguably religious"). Whether secular humanism and creation science are appropriately classified as religious may in many cases not be determinative of establishment or free exercise clause challenges to their inclusion in public school curricula. *See infra* notes 217, 289 & accompanying text.

8. *See infra* text accompanying notes 188–89.

9. *See infra* text accompanying notes 202–09.

of such cases depends largely upon the particular facts involved.[10] Therefore, these decisions provide relatively vague guidance for the resolution of other cases involving similar legal issues but different facts. Furthermore, the Supreme Court decisions concerning judicial review of public school curricula do not specify evidentiary principles for resolving such cases.[11] For all of the foregoing reasons, the few lower courts that have adjudicated disputes concerning secular humanism or creation science in public school curricula—the Supreme Court not yet having directly reviewed such a case—have employed differing analytical approaches and reached inconsistent results.[12]

Many of the opinions concerning secular humanism or scientific creationism in public school curricula are problematical for the further reason that they do not analyze free exercise clause concerns separately from establishment clause claims, notwithstanding the distinct religious freedom interests protected by each of these first amendment guarantees.[13] Even if the establishment clause does not prohibit the inclusion of certain material in the public school curriculum, it does not automatically follow—as some school authorities have argued—that the free exercise clause permits schools to teach such material to students who have religious objections to it. Conversely, even if the free exercise clause does not permit a school to teach certain materials to individual students who have religious objections to it, it does not automatically follow—as some objecting parents, students, and religious leaders have argued—that the material must be deleted from the curriculum. Rather, alternative arrangements must be considered for accommodating the rights of students who object to curricular material that is inconsistent with their religious beliefs, without violating the rights of other students to study material that is not tailored to any religious beliefs.[14] The cases to date have not sufficiently explored such accommodation strategies.

Parts I and II of this Article examine the relatively few reported decisions concerning challenges to secular humanism or scientific creationism in public school curricula. Part III outlines the Supreme Court precedents most directly relevant to these challenges: the line of cases authorizing expansive judicial invalidation of

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10. *See, e.g.*, Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216, 3224 (1985) ("Establishment Clause jurisprudence is characterized by few absolutes"); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 226 (1948) (stressing "the importance of detailed analysis of the facts to which the Constitutional test of Separation is to be applied"). The Court has likewise stressed that establishment clause cases in general turn upon judicial assessment of the particular facts involved. *See, e.g.*, Lynch v. Donnelly, 468 U.S. 668, 678–79 (1984): "In each case, the inquiry calls for line drawing; no fixed, *per se* rule can be framed. . . . The [Establishment] Clause erects a 'blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship.'" (Quoting Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).) *Accord*, Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970) ("Each value judgment under the Religion Clauses must . . . turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so.").

11. *See infra* text accompanying notes 233, 237 & text following note 242.

12. These decisions are discussed *infra* text accompanying notes 39–79 (secular humanism) and 80–127 (scientific creationism). The Supreme Court will review one of these cases during its 1986–87 Term. *See infra* note 117.

13. For summaries of establishment and free exercise doctrine, focusing upon the public school context, *see infra* text accompanying notes 145–85 and 259–79. Regarding the somewhat overlapping and somewhat differing religious freedom interests protected by the two religion clauses, *see infra* notes 159 & 258.

14. *See infra* Part V.

public school curricular decisions to protect students' religious beliefs from indirect governmental influence; and the single case directly addressing judicial invalidation of public school curricular decisions to protect students' non-religious beliefs from indirect governmental influence, which strictly limited such intervention. Part IV proposes legal standards and evidentiary guidelines for resolving establishment clause claims that curricula should be modified to eliminate alleged governmental influences upon religious beliefs. These proposals harmonize and amplify the somewhat inconsistent and amorphous principles derived from the two most pertinent sets of Supreme Court precedents. Part V proposes legal standards and evidentiary guidelines for resolving free exercise clause claims that particular students should not be exposed to certain portions of the public school curriculum. Finally, Part VI illustrates the operation of the proposed standards in the context of two current cases challenging secular humanism and scientific creationism in public school curricula.

I. CHALLENGES TO SECULAR HUMANISM IN PUBLIC SCHOOL CURRICULA

A. *The Critics' View Of Secular Humanism*

In the twenty-five years since the Supreme Court invalidated organized prayer and Bible-reading in the public schools,[15] proponents of organized religion in public schools have persistently decried the schools' secularization.[16] Recently, they have increasingly invoked the term "secular humanism" to describe not only the general absence from the school curricula of organized religious expression, but also the inclusion in the curricula of various topics or ideas that are allegedly inconsistent with certain religious beliefs. The major curricular targets of the religious leaders, parents, and students who oppose secular humanism include evolution, sex education, and any non-religious instruction in morals, ethics, or values.[17] However, various opponents

15. School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

16. *See, e.g.*, Hitchcock, *Church, State, and Moral Values: The Limits of American Pluralism*, 44 LAW & CONTEMP. PROBS. 3, 13 (Spring 1981) [hereinafter cited as Hitchcock] (exclusion of religion from education shapes "religionless world"); Louisell, *Does the Constitution Require a Purely Secular Society?*, 26 CATH. U. L. REV. 20, 34 (1976) (Supreme Court "is no longer guaranteeing neutrality but is actually throwing its weight toward a purely secular society"); Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692, 700–01 (1968) [hereinafter cited as Schwarz] (in operating public schools, the state must either give equal time to religious perspective on "secular" subject matter, which would inevitably result in discrimination among religions, or it must "limit itself to secular frames of reference, thereby belittling religion"; the decision in favor of secular curriculum represents, in establishment terms, a choice of general antireligionism as an evil lesser than the alternative of discrimination among religions"); Toscano, *A Dubious Neutrality: The Establishment of Secularism in the Public Schools*, 1979 B.Y.U. L. REV. 177, 184 [hereinafter cited as Toscano] (Court's ostensible theory of religious neutrality is actually "biased toward secularism and against theism").

17. A growing number of public schools, often pursuant to state legislative mandates, are including instruction in "Values Clarification" or other approaches to moral and ethical issues that do not refer to traditional religious concepts. *See, e.g.*, Moskowitz, *The Making of the Moral Child: Legal Implications of Values Education*, 6 PEPPERDINE L. REV. 105, 113–17 (1978). These courses have been criticized for raising serious religious freedom problems. *See, e.g., id.* at 120 (for example, "values education . . . applies its analytic method upon religious beliefs and practices . . . sometimes with thinly veiled skepticism; . . . the relativistic premise of . . . values education is contrary to the absolutistic premise of most Western religions and it has been argued that it affects the way in which students will . . . approach their religions . . . .").

The proponents of values or moral education originally contended that it is value neutral, instilling analytical processes rather than substantive content. However, a leading proponent of this type of education, Lawrence Kohlberg, has acknowledged that "moral education must be partly 'indoctrinative.'" Kohlberg, *Moral Education Reappraised*, 38:6

of secular humanism have ascribed differing meanings to this amorphous term, and have described it as encompassing varying catalogues of viewpoints on a whole host of specific political, economic, and social issues.[18]

In addition to viewing secular humanism as embracing numerous particular viewpoints about specific issues, those who seek to purge it from the public school curriculum also view it as embodying certain broad, general principles that pervade the curriculum at least implicitly, if not expressly. For example, two prominent advocates of removing secular humanism from public schools have described it as entailing beliefs in the following: "a cooperative effort to promote social well-being";[19] "the supremacy of 'human reason'";[20] "science as the guide to human progress";[21] "the self-sufficiency and centrality of Man";[22] "man's inherent goodness";[23] and the general theory of evolution.[24]

The broad, vague view of secular humanism that is held by those who seek to eradicate it from the public schools is not coextensive with the specific tenets of the organizations that expressly espouse humanism,[25] such as the American Humanist

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HUMANIST 15 (Nov.–Dec. 1978). Because values or moral education encompasses matters within the religious sphere, any indoctrination it accomplishes necessarily encroaches upon religious freedom.

To date, challenges to the alleged inclusion of secular humanism in public school curricula have concerned humanistic values that are assertedly implicit in reading and other courses not expressly focusing upon values. *See infra* text accompanying notes 39–71. However, the pending *Smith* case, discussed *infra* text accompanying notes 72–79, apparently seeks to eliminate from the public school curriculum express, as well as implied, instruction in values that assertedly promote secular humanism and inhibit Christianity. "Memorandum of Law of Plaintiffs Smith," Civil Action No. 82-0554-H (S.D. Ala., October 10, 1985) [hereinafter cited as Memorandum of Plaintiffs Smith] at 168–70. The legal standards and evidentiary principles that this Article proposes for reviewing challenges to public school curricula would be equally applicable to explicit and implicit elements of the curricula.

18. For example, in a pamphlet entitled IS HUMANISM MOLESTING YOUR CHILD?, a Fort Worth, Texas parents' group described secular humanism as a belief in "equal distribution of America's wealth . . . control of the environment, control of energy and its limitation . . . the removal of American patriotism and the free enterprise system, disarmament and the creation of a one-world socialistic government." Barringer, *Department Proposes Rule to Curb Teaching of "Secular Humanism,"* Washington Post, Jan. 10, 1985, at 19, col. 4. *See also* "Editorial Memorandum" dated February 1986, published by People for the American Way, 1424 16th St., N.W., Suite 601, Washington, D.C. 20036, at p. 2:

> Television evangelist James Kennedy calls [secular humanism] a "godless, atheistic, evolutionary, amoral, collectivist, socialistic, communist religion." The Rev. Jerry Falwell refers to its "satanic influence" and warns: "It advocates abortion-on-demand, recognition of homosexuals, free use of pornography, legalizing prostitution and gambling, and free use of drugs, among other things." Michael Farris, an attorney with Concerned Women for America . . . defines [secular humanism] as "a combination of atheism and Eastern religion."

See generally Whitehead & Conlan, *The Establishment of the Religion of Secular Humanism and its First Amendment Implications*, 10 TEX. TECH. L. REV. 1 (1978) [hereinafter cited as Whitehead & Conlan].

19. Whitehead & Conlan, *supra* note 18, at 37.

20. *Id.* at 38.

21. *Id.* at 42.

22. *Id.* at 43.

23. *Id.* at 44.

24. *Id.* at 46. For another list of the asserted principles on which "nearly all Humanists agree," *see* Memorandum of Plaintiffs Smith, *supra* note 17, at 31:

a. God is either nonexistent or irrelevant to modern man.

b. Man is the supreme value in the universe.

c. Man is purely a material or biological creature.

d. No absolute morals or values exist.

e. Man, through the use of his scientific reason, will save himself.

25. *See* Note, *supra* note 7, at 1209 n.69: "'Humanism' refers to a number of movements and beliefs, both historical and contemporary. . . . 'Secular Humanism' likewise describes no single organized movement."

Association[26] and the Council for Democratic and Secular Humanism.[27] Moreover, the efforts to rid public schools of secular humanism are not confined to eliminating the expression of views by teachers who are affiliated with any humanist organization. Instead, the religious leaders, parents, and students who consider secular humanism inconsistent with their religious beliefs regard it as an expansive doctrine that exerts pervasive influence on individuals and institutions with no direct tie to any humanist organization.[28] In particular, these opponents of secular humanism believe that it has influenced public schools all over the country,[29] and have announced their intentions to oppose this perceived influence before growing numbers of school boards and courts.[30]

B. *Judicial Decisions Concerning Secular Humanism in Public School Curricula*

Although complaints that public school curricula promote secular humanism have recently been increasing around the country, many of these complaints are resolved without litigation. To date, there are reported judicial decisions in only four

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The plaintiffs in the current *Smith* case, discussed *infra* text accompanying notes 72–79, contend that "there are many varieties of Humanist organizations," and list among them the Ethical Culture Fellowship, Free Religious Association, World Union of Free Thinkers, American Rationalist Association, Unitarian-Universalists, Bertrand Russell Society, Society of Evangelical Agnostics, and United Secularists of America. Memorandum of Plaintiffs Smith, *supra* note 17, at 30–31 & n.63. Similarly, the *Smith* plaintiffs contend that there are "many sects or categories of Humanists" (*id.* at 30–31), and allege that "the various names for Humanism" include "Rationalism," "Marxism," "Communism," "Socialism," and "Materialism." *Id.* at 31 n.64.

26. The American Humanist Association ("AHA"), which is based in Buffalo, New York, presently has approximately 3,000 members and approximately 50 chapters nationwide. It publishes a regular newsletter entitled FREE MINDS, a magazine entitled THE HUMANIST, which appears six times per year, and a quarterly journal entitled CREATION/EVOLUTION. In 1933, the AHA published the HUMANIST MANIFESTO, which set forth "a consistent statement on social policy." In 1973, the AHA published HUMANIST MANIFESTO II, which superseded the original manifesto.

27. The Council, which is not a membership organization, was formed in 1980 by a former editor of the AHA's THE HUMANIST. The Council has issued A SECULAR HUMANIST DOCUMENT, which it describes as "the sequel to" the AHA's HUMANIST MANIFESTOS, *see supra* note 26. The Council publishes a magazine entitled FREE INQUIRY, which has approximately 15,000 subscribers.

Plaintiffs in the *Smith* case, discussed *infra* text accompanying notes 72–79, list the following additional organizations with the word "Humanist" (or some variation thereof) in their titles: Ethical Humanist Fellowship, International Humanist and Ethical Union, Fellowship of Religious Humanists, Humanist Fellowship, Humanist Press Association, North American Committee for Humanism, Humanist Institute, Society for Humanistic Judaism. Memorandum of Plaintiffs Smith, *supra* note 17, at 30–31 n.63.

28. Even curricular material that does not overtly promote secular humanism or undermine other arguably religious beliefs may still be challenged as allegedly doing either, albeit indirectly. *See, e.g.*, letter dated April 20, 1984, from Beverly LaHaye, President of Concerned Women for America Education & Legal Defense Foundation, P.O. Box 5100, San Diego, CA 92105 (stating that reading textbook series at issue in *Mozert*, *see infra* text accompanying notes 43–61, "attacked, sometimes with devious subtlety, biblical Christianity").

29. Opponents of secular humanism trace its supposed rise in public school classrooms to the fact that the prominent education reformer, John Dewey, was one of the signers of the first HUMANIST MANIFESTO, *see supra* note 26. These opponents contend that the graduate schools of education, where many public school teachers are trained, instill secular humanist principles. *See* Washington Post, Dec. 30, 1985, at A7. *See also infra* note 44 (quotes letter to editor from a leading activist against secular humanism in public schools, referring to secular humanism as "the religion of John Dewey").

30. *See, e.g.*, Mackey-Smith, *Schools are Becoming the Battleground in the Fight Against Secular Humanism*, Wall St. J., Aug. 6, 1985, at 31, col. 4 (quotes Michael Farris, general counsel for Concerned Women for America, an organization that provides legal services to parents seeking to eliminate secular humanism from public schools, as saying that "[e]very school district in this country to a greater or lesser extent is involved with secular humanism," and predicting that over the next year 2,000 to 3,000 school districts will be accused of incorporating secular humanism in their curricula).

cases arising from such complaints.[31] This section discusses these four cases, as well as a fifth that is being litigated at the time of printing.

1. Davis v. Page[32]

Plaintiffs, elementary school children who were members of the Apostolic Lutheran faith,[33] contended that their religious freedom and other constitutional rights would be violated if they were forced to take a proposed mandatory course entitled "Health and Education."[34] According to plaintiffs, this course taught the "humanist" philosophy. The court rejected plaintiffs' request to be excused from the proposed course because of the "paucity of evidence . . . that the teaching of this course will burden their religion or its free exercise."[35] Although the pastor of the plaintiffs' church testified, he "was unable to specify what tenets of the Apostolic Lutheran faith the health course would violate."[36] The court concluded that the plaintiffs had at most shown the "humanist" concepts allegedly taught in the prospective course to be "distasteful" to them,[37] a showing that does not trigger the protections of the Constitution's religion clauses.[38]

2. Williams v. Board of Education of Kanawha[39]

This decision, which rejected an effort to eliminate certain books and supplementary materials from a public school curriculum, does not expressly mention secular humanism. However, the portions of the complaint quoted in the opinion make clear that the plaintiffs challenged the curricular materials at issue because they allegedly purveyed what is now widely termed "secular humanism" by those who

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31. *See also* Rhode Island Federation of Teachers, AFL-CIO v. Norberg, 630 F.2d 850 (1st Cir. 1980) (affirmed denial of parents' motion to intervene in defense of state statute granting income tax deductions for expenses incurred in sending children to public and private primary and secondary schools; parents argued that state funding of public education amounts to advancement of religion of secular humanism in violation of establishment and free exercise clauses, since there is no concomitant aid to those who seek sectarian education; court affirmed denial of motion on rationale that even if secular humanism is a religion, and even if it is taught in public schools, appropriate remedy would be prohibition of its teaching, not adoption of tax deductions that facilitate attendance at schools teaching other religions).

32. 385 F. Supp. 395 (D.N.H. 1974). Another aspect of this case is discussed *infra* note 292.

33. Based upon the young age of both Davis children, and the testimony of one of them, the court expressed some skepticism as to whether they "understand[] the ramifications of [their] religious beliefs." *Id.* at 398. It accordingly recognized that the real freedom at issue was not the children's right to the free exercise of religion, or even their parents', but rather "the right of the parents to inculcate and mold their children's religious beliefs to conform to their own without the children being subjected to school programs and materials which the parents deem offensive and subversive of these beliefs." *Id.*

34. The prospective course was to cover "family relationships; mental and physical health; personal hygiene; nutrition; hazards of smoking; dangers and benefits of drugs; and environmental concern." *Id.* at 402. Plaintiffs did not seek to have the course dropped from the curriculum, but instead requested to be excused from attending it. *Id.* at 397–98.

35. *Id.* at 402.

36. *Id.* at 404.

37. The decision does not indicate that the plaintiffs specified which ideas allegedly encompassed in the "humanist" philosophy assertedly conflicted with their religious beliefs. Plaintiffs merely alleged that their faith makes it sinful for them, among other things, to "study evolution, study 'humanist' philosophy, partake in sexually oriented teaching programs, [or] openly discuss personal and family matters . . . ." *Id.* at 397.

38. *Id.* at 404, quoting Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 505 (1952) ("[T]he state has no legitimate interest in protecting any or all religions from views distasteful to them"). *See infra* note 221–22 & accompanying text.

39. 388 F. Supp. 93 (S.D. W. Va. 1975), *aff'd mem. on rehearing*, 530 F.2d 972 (4th Cir. 1975) (without opinion).

challenge similar material. The plaintiffs complained that the challenged texts contained "anti-religious materials, matter offensive to Christian morals, matter which invades personal and familial morals, matter which defames the Nation and which attacks civic virtue."[40]

Without explanation, the court rejected plaintiffs' claims that the inclusion of the challenged materials in the curriculum violated the establishment clause and their privacy rights.[41] In likewise rejecting plaintiffs' claim that the inclusion of these materials violated the free exercise clause, the court simply commented that "the First Amendment . . . does not guarantee that nothing about religion will be taught in the schools nor that nothing offensive to any religion will be taught in the schools."[42]

3. Mozert v. Hawkins County Public Schools[43]

Plaintiffs, certain public school children and their parents, challenged the schools' use of the *Holt Basic Readers* textbook series, published by Holt, Rinehart & Winston, to teach reading from first through eighth grade. Plaintiffs asserted that the books contained ideas and values contrary to their religious beliefs, and that their religion forbade exposure to such inconsistent views.[44] Plaintiffs therefore sought an injunction allowing religiously objecting students to learn reading from other state-approved texts, and excusing them from any class where the challenged books were read or discussed.[45]

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40. *Id.* at 94–95.

41. *Id.* at 96.

42. *Id.*

43. 579 F. Supp. 1051 (E.D. Tenn. 1984) (dismissing all but one allegation in complaint); *aff'd in part and rev'd in part*, 582 F. Supp. 201 (E.D. Tenn. 1984) (granting summary judgment dismissing sole remaining allegation in complaint); *rev'd & remanded*, 765 F.2d 75 (6th Cir. 1985).

44. For a description of the values allegedly conveyed by the challenged books, which assertedly conflicted with and undermined plaintiffs' religious beliefs, *see* 582 F. Supp. at 202:

> [Plaintiffs contend] that the books, as a whole, tend to instill in the readers a tolerance for man's diversity. It is this underlying philosophy that offends the plaintiffs who believe that Jesus Christ is the only means of salvation. Plaintiffs reject for their children any concept of world community, or one-world government, or human interdependency. They also strongly reject any suggestion . . . that all religions are merely different roads to God . . . .

Examples of specific passages in the challenged books that allegedly conveyed these values were described in a letter to the editor of the Kingsport, Tennessee Times News, Oct. 18, 1983, by lead named plaintiff Robert Mozert. He wrote:

> Two of the tenets of [secular humanism] is [sic] pro-ERA and change of cultural ethics and values. To show parents how this doctrine is preached to the Hawkins County school children so cleverly and unobtrusively, . . . we will review one of the first grade texts . . . .
>
> The pro-ERA indoctrination begins on page 15 where "Jim cooks" while the little girl reads. . . . True, the little girl cooks after Jim but the religion of John Dewey is planted in the first graders [sic] mind that there are no God-given roles for the different sexes . . . .
>
> To frustrate and confuse the first grader, thereby "preaching" secular humanism to impressionable minds the story of Goldilocks . . . carries no punishment for the crime. Goldilocks trespassed [and] showed no respect for the property of others. . . . however, . . . she does not pay for her crime by being scared out of her wits.

45. The school authorities had denied plaintiffs' request that their children be excused from the regular reading program and allowed to hold their own alternative reading classes using other state-approved texts that they did not find religiously offensive. 579 F. Supp. at 1052. Some students who had refused to read the assigned textbooks because of their asserted religious beliefs were suspended from school. 765 F.2d at 77.

a. *District Court Opinions*

As the district court emphasized, the complaint did not allege that the schools attempted to coerce students into performing any symbolic act or professing any belief. Rather, the plaintiffs complained that their free exercise rights were violated by the students' mere exposure to the objectionable ideas and values.[46] The *Mozert* district court agreed with the *Davis* and *Williams* courts that the first amendment does not offer protection "from exposure to merely offensive value systems or . . . to antithetical religious ideas."[47] More specifically, the *Mozert* district court ruled that the mere exposure to books would violate free exercise rights only if it could be shown that the books "teach[ ] a particular religious faith as true . . . or that the students must be saved through some religious pathway, or that no salvation is required . . . ."[48] Of all the objectionable lessons that plaintiffs alleged the challenged books to teach, the only one that the district court found might state a cognizable claim, under the foregoing standard, was "that one does not have to believe in God in a specific way but that any type of faith in the supernatural is an acceptable method of salvation."[49] In its first opinion, the court accordingly dismissed all of the complaint's remaining allegations, including that the books "teach various humanistic values."[50]

In its second opinion, the *Mozert* district court dismissed the complaint's sole remaining allegation, having examined the specific passages from the disputed books that plaintiffs cited to support this allegation. Plaintiffs apparently conceded that "the books neither instruct the children that they must be saved, nor that they do not need any form of religion."[51] Instead, plaintiffs objected to what they perceived as the books' underlying philosophy: to promote a sense of "world community" and religious tolerance.[52] For purposes of ruling on the motion to dismiss plaintiffs' remaining claim, the court accepted plaintiffs' allegation that the books' perceived underlying philosophy conflicted with their belief in the Christian doctrine of salvation. The court nevertheless concluded that plaintiffs' exposure to the challenged books in the public school curriculum did not violate their religious freedom. It therefore entered summary judgment in defendant's favor.[53]

The court's rationale for dismissing the complaint's remaining allegation is not completely clear. In discussing one particular poem to which plaintiffs objected, the court noted that the books contained no suggestion that "all should subscribe to [the] thinking" expressed in the poem, but that the poem was simply presented "for what it is worth."[54] This statement indicates that the court found the books to be religiously neutral because they were non-didactic in tone, simply offering ideas for

46. 579 F. Supp. at 1052.
47. *Id.* at 1053.
48. *Id.*
49. *Id.* at 1052.
50. *Id.* at 1052–53.
51. 582 F. Supp. at 201.
52. *Id.* at 201–02.
53. *Id.* at 203.
54. *Id.* at 202.

the students' consideration, but not expressing approval or disapproval of any. However, the court also stated that the reading series, viewed as a whole, "illustrates the type of religious tolerance presumably requisite to the ideal 'world citizen.'"[55] This statement indicates that the court found the books to express approval of religious tolerance and "world citizenship." Far from finding any constitutional problem in the plaintiffs' forced exposure to these school-endorsed values or concepts, which the court assumed were contrary to plaintiffs' sincere religious beliefs, the court expressed its own endorsement of them.[56]

b. *Sixth Circuit Decision*

In 1985, the Court of Appeals for the Sixth Circuit reversed the district court's summary judgment dismissing the *Mozert* complaint and remanded the case for a trial.[57] The appellate court concluded that there were two genuine issues of material fact: whether the plaintiff parents and children sincerely held religious beliefs requiring that they not be exposed to the ideas contained in the challenged books; and whether the school's interest in using the same textbooks to teach reading to all children was sufficiently compelling to override the plaintiffs' asserted free exercise right to participate in an alternative reading program.[58]

The *Mozert* district court had assumed for purposes of the summary judgment motion that plaintiffs' sincere religious beliefs were offended by exposure to the challenged books. It had concluded as a matter of law, however, that such exposure did not violate the first amendment's religion clauses.[59] The district court's conclusion was apparently premised upon the view that exposure to religiously offensive ideas in public school curricula is a burden that may reasonably be imposed upon anyone choosing to attend a public school.[60] Correspondingly, the district court evidently concluded, as a matter of law, that the public schools should not bear the

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55. *Id.*

56. *Id.* at 203. The *Mozert* district court's ruling seems to be grounded on the notion that a public school's endorsement of views inconsistent with some students' religious beliefs does not violate the first amendment, so long as the school does not expressly indicate its hostility to the students' religious beliefs. This notion assumes that there is a meaningful distinction between a school's expressed approval of a view that is directly contrary to a religious belief and its expressed disapproval of the religious belief. Such a subtle distinction is probably especially elusive for public school students, who are relatively unsophisticated intellectually, and relatively susceptible to the influence of their teachers and classmates. *See infra* text accompanying notes 202–09; note 205.

57. 765 F.2d 75, 78–79.

Just before this Article went to press, on October 24, 1986, Judge Hull issued his decision following the bench trial on remand. The author and editors were unable to obtain a copy of Judge Hull's opinion. However, according to an article in The New York Times, the Judge ruled that the plaintiff's students could not be forcibly exposed to the challenged books in light of their sincerely held religious objections to them. The Judge concluded that the schools could fulfill their objectives with regard to the plaintiff's students through alternative means, such as excusing these students from reading classes and allowing them to learn to read at home. Judge Hull's ruling was expressly limited to the facts. The opinion stated that it "shall not be interpreted to require the school system to make this option available to any other person or to these plaintiffs for any other subject." Nor did the opinion disapprove the continued use of the challenged books in the school curriculum. Nevertheless, the defendants said that they would appeal from this ruling because it "could turn schools into a cafeteria line from which parents of different persuasions could choose and reject courses that pleased or offended their beliefs." *Fundamentalists Win A Federal Suit Over Schoolbooks*, The New York Times, Oct. 25, 1986, p. A1 col. 3.

58. *Id.* at 78.

59. 582 F. Supp. at 202.

60. *See id.* at 203; 579 F. Supp. at 1052–53.

burden of providing alternative reading curricula to protect students from exposure to religiously offensive views. In contrast, the appellate court treated the question of what burden, if any, a school should be required to bear to accommodate students' religious beliefs as an issue of fact.[61]

4. Grove v. Mead School District No. 354[62]

In *Grove*, the Court of Appeals for the Ninth Circuit affirmed the district court's summary judgment dismissing a complaint that the inclusion of a particular book in the school curriculum violated the free exercise and establishment clauses. A student who complained that the book expressed ideas contrary to her religious beliefs was given permission to read another book instead, and to be excused from class discussions of the allegedly offensive book. However, the student's mother and other taxpayers sought to have the book removed from the curriculum altogether, contending that the primary effect of its use was to inhibit their religion of fundamentalist Christianity, and to advance the religion of secular humanism. Although the court said that secular humanism "may be a religion," it concluded that the use of the book would not in any event constitute an establishment of religion, because only a small part of the book discussed religion, and the book was included in a group of religiously neutral works as a comment on an American subculture.[63]

Describing the case as raising a "matter of first impression," Judge Canby authored a more extensive concurring opinion, which is to date the most in-depth judicial analysis of a challenge to secular humanism in public school curricula.[64] Judge Canby first noted some general flaws underlying—and undermining—plaintiffs' establishment clause claims. He observed that plaintiffs displayed a "dualistic social outlook," which "tends to divide the universe of value-laden thought into only two categories—the religious and the anti-religious."[65] Judge Canby agreed with plaintiffs that the establishment clause prohibits the promotion of secularism as a body of anti-religious doctrine. However, he explained that the secularization of the public schools, about which plaintiffs complained, neither promotes anti-religious doctrine nor violates the establishment clause. To the contrary, he said, this secularization constitutes the very means by which schools have achieved compliance with the establishment clause.[66]

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61. The Sixth Circuit remanded the case so the district court could "make factual findings and conclusions of law" and "permit reasonable discovery if requested." 765 F.2d at 78. However, the Sixth Circuit did not specify the nature of the relevant facts or the standards under which any factual evidence should be evaluated.

62. 753 F.2d 1528 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 85 (1985).

63. *Id.* at 1534. The book at issue was *The Learning Tree*, by Gordon Parks. *Id.* at 1531.

64. *Id.* at 1535–43.

65. *Id.* at 1536.

66. *Id.* at 1538 n.12. This concept was also expressed in Justice Jackson's majority opinion in West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943). Justice Jackson stated that "[f]ree public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party or faction." Justice Jackson's statement may not accurately describe sociological fact—*i.e.*, there may well be a "creed" that perceives "secular instruction" as its "enemy." *See, e.g., infra* note 270 & accompanying text. Nevertheless, this statement does accurately reflect a basic constitutional fact—*i.e.*, secular instruction cannot be deemed the "enemy," for establishment clause purposes, of any creed. *See infra* note 224; text accompanying notes 223–32.

Focusing specifically upon plaintiffs' establishment clause challenge to the disputed book, Judge Canby concluded that neither the purpose nor the effect of the school's use of the book was "hostility toward Christianity or fealty to any secularist credo."[67] Even assuming that the book contained anti-Christian and pro-secular humanist views, Judge Canby concluded that these views were present as a matter of "education and exposure," rather than "advocacy or endorsement."[68] Accordingly, he further concluded that the book's mere inclusion in the school curriculum could not reasonably be construed as the school's endorsement of any attitude toward religious beliefs that may have been expressed by the book's authors or editors.

Turning to the free exercise claim, Judge Canby concluded that the student's belief that she would suffer "eternal religious consequences" from direct exposure to the challenged book—*i.e.*, through reading and discussing it herself—may well have prohibited the school from requiring such direct exposure.[69] However, the student further argued that her religious beliefs would be violated by even her indirect exposure to the book—*i.e.*, through its inclusion in the curriculum and its assignment to and discussion by other students. Judge Canby concluded, though, that the free exercise clause did not go so far as to protect against such indirect exposure. Noting that this aspect of plaintiffs' complaint in effect constituted a blanket objection to what they viewed as the wholesale secularization of society, Judge Canby observed:

> The inevitability of this conflict between plaintiffs' religious rejection of "secularism" and the secularization of society suggests why antipathy alone . . . is never enough to sustain a free exercise challenge. Plaintiffs are religiously offended by a particular novel; others previously before us have been religiously offended by Trident submarines or the nuclear arms race. Were the free exercise clause violated whenever governmental activity is offensive to or at variance with sincerely held religious precepts, virtually no governmental program would be constitutionally possible.[70]

In concluding his concurring opinion, Judge Canby observed that the removal of curricular material, in response to religiously-based hostility to the ideas it expresses, would threaten fundamental values protected by the first amendment.[71]

5. Smith v. Board of School Commissioners of Mobile County

In this action, which is currently pending before Judge Brevard Hand of the United States District Court for the Southern District of Alabama, numerous students, teachers, and parents claim that the Mobile County, Alabama public school system has violated both the establishment and free exercise clauses by promoting secular humanism and "systematically exclu[ding] from the curriculum . . . the existence, history, contributions, and role of Christianity in the United States and the world."[72]

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67. *Id.* at 1539.

68. *Id.* at 1540.

69. This question did not have to be resolved conclusively because the school had voluntarily excused the student from reading the book or attending class sessions at which it was discussed. *Id.* at 1533.

70. *Id.* at 1542. *See also infra* note 222.

71. *Id.* at 1543 (citing Board of Education, Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853 (1982), discussed *infra* text accompanying notes 139–44).

72. Memorandum of Plaintiffs Smith, *supra* note 17, at 3. Plaintiffs also assert violations of the students' free

The *Smith* case has not yet yielded any reported decisions.[73] However, it is one facet of ongoing litigation concerning the role of religion in the Mobile County public schools, which has resulted in two reported decisions by Judge Hand. These opinions provide an indication of Judge Hand's views regarding the *Smith* claims.

The *Smith* case is an outgrowth of litigation over Alabama's statutes permitting vocal or silent prayer in public schools.[74] Judge Hand had sustained all of Alabama's school prayer statutes on the theory that the establishment clause should not be binding upon the States.[75] Perhaps anticipating the Supreme Court's (as well as the Eleventh Circuit's) emphatic rejection of his attempt to "overrule" so much establishment clause precedent,[76] Judge Hand concluded one of his opinions in the school prayer litigation by stating:

> If the appellate courts disagree with this court in its examination of history . . . then this court will look again at the record in this case and reach conclusions which it is not now forced to reach.[77]

In an extensive footnote, Judge Hand explained that a "major area that this court must concern itself with should its judgment be reversed is . . . other religious teachings now conducted in the public schools."[78] He then indicated his inclination, based on the evidence he had already heard, to treat secular humanism as being on a par with Christianity in terms of the limited role it should play in the public schools.[79]

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speech right to receive information, the teachers' free speech right to receive information, the teachers' free speech rights of uncoerced communication, and Alabama statutes mandating the teaching of American history, tradition, and patriotism. *Id.* at 131–52, 163–67.

Plaintiffs claim that substantial indoctrination in support of secular humanism and in opposition to Christianity is contained in textbooks used in numerous subjects, including values clarification, literature, psychology, reading, social studies, special education, and vocational education. *Id.* at 14–15. Plaintiffs base this claim in part upon allegations that the books "ignore" historical events concerning religion, family values, charitable and church contributions to society, the value of work, patriotism, and the current role of religion in America. *Id.* at 165–66. Plaintiffs further base this claim on allegations that the books convey certain concepts or values, including: hard work may not necessarily be positive (*id.* at 94); sex roles may be flexible, rather than as prescribed in the Bible (*id.* at 87); moral values are relative (*id.* at 87–88); drinking is not necessarily wrong (*id.* at 88); pupils should not be anxious about the supernatural (*id.* at 89); family roles may be flexible, rather than as prescribed in the Bible, with the husband as the head (*id.* at 94–95). Although plaintiffs do not claim that the school officials intentionally selected books espousing humanistic ideals or rejecting Christian ideals (*id.* at 64), by way of relief they seek broadly to enjoin the Mobile County School system from using textbooks or other reading materials that advance humanism or inhibit Christianity. *Id.* at 169–70.

73. Testimony ended in the Smith trial on October 22, 1986, just before this Article went to press. At the time of printing, Judge Hand had not yet issued a decision.

74. This litigation has led to the Supreme Court's decision in Wallace v. Jaffree, 105 S. Ct. 2479 (1985), discussed *infra* text accompanying notes 168–79.

75. Jaffree v. Board of School Comm'rs, 554 F. Supp. 1104, 1118–28 (S.D. Ala. 1983), *aff'd in part, rev'd in part and remanded with directions sub nom.* Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983), *aff'd*, 466 U.S. 924 (1984), *aff'd on other grounds sub nom.* Wallace v. Jaffree, 105 S. Ct. 2479 (1985).

76. *See Wallace*, 105 S. Ct. at 2486:

> Our unanimous affirmance of the Court of Appeals' judgment concerning [the Alabama statute authorizing teachers to lead "willing students" in a prescribed prayer to "Almighty God . . . the Creator and Supreme Judge of the world"] makes it unnecessary to comment at length on the District Court's remarkable conclusion that the Federal Constitution imposes no obstacle to Alabama's establishment of a state religion. . . . [I]t is nevertheless appropriate to recall how firmly embedded in our constitutional jurisprudence is the proposition that the several States have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States.

77. 554 F. Supp. at 1129.

78. *Id.* at 1129 n.41.

79. *Id.* Judge Hand stated, in part:

> It was pointed out in the testimony that the curriculum in the public schools of Mobile County is rife with efforts

II. Challenges to Evolution and Creationism in Public School Curricula

In 1968, in *Epperson v. Arkansas*,[80] the Supreme Court held unconstitutional an Arkansas statute making it a crime to teach evolution in the public schools. Since then, parents, students, and others who view evolution as contrary to their religious faith in the biblical account of creation have pursued alternative approaches for minimizing the role of evolutionary theory in public school curricula. Some arguments in support of these efforts closely resemble those voiced by opponents of secular humanism in the schools. Indeed, many who oppose public school instruction in evolutionary theory assert that this theory is a major tenet of secular humanism.[81] Therefore, they argue, the public schools' teaching of evolution violates the

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at teaching or encouraging secular humanism—all without opposition from any other ethic—to such an extent that it becomes a brainwashing effort. If this Court is compelled to purge "God is great, God is good, we thank Him for our daily food" from the classroom, then this Court must also purge from the classroom those things that serve to teach that salvation is through one's self rather than through a diety [sic].

As an example of curricular material that he viewed as impermissibly promoting secular humanism, Judge Hand cited the use of the word "Goddamn" in a fourth grade textbook. Jaffree v. James, 544 F. Supp. 727, 732 (1982). He explained: "[I]t can clearly be argued that as to Christianity [this word] is blasphemy and is the establishment of . . . humanism, secularism or agnosticism. If the state cannot teach or advance Christianity, how can it teach or advance the Antichrist?" *Id.*

For further indications of Judge Hand's view that schools are impermissibly promoting secular humanism, see his opinion in Jaffree v. James, 544 F. Supp. 727, 732 n.2 (S.D. Ala. 1982) (preliminary injunction granted), *withdrawn sub nom.* Jaffree v. Board of School Comm'rs, 554 F. Supp. 1104 (S.D. Ala. 1983), *aff'd in part, rev'd in part and remanded with directions sub nom.* Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983), *aff'd*, 466 U.S. 924 (1984), *aff'd on other grounds sub nom.* Wallace v. Jaffree, 105 S. Ct. 2479 (1985):

> It is common knowledge that miscellaneous doctrines such as evolution, socialism, communism, secularism, humanism, and other concepts are advanced in the public schools. . . . It is time to recognize that the constitutional definition of religion encompasses more than Christianity and prohibits as well the establishment of a secular religion.

80. 393 U.S. 97 (1968). The Supreme Court held that this statute violated the establishment clause because it could not "be justified by considerations of state policy other than the religious views of some of its citizens." *Id.* at 107. Finding that the law "selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine," *id.* at 103, the Court noted that "the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma." *Id.* at 106.

Justice Black thought the statute should be invalidated under the fourteenth amendment's due process clause on grounds of vagueness, but questioned the majority's establishment clause rationale. *Id.* at 111–12 (Black, J., concurring). In particular, he expressed concern about the implications of the majority's reasoning upon "the religious freedom of those who consider evolution an anti-religious doctrine." *Id.* at 113. In a passage that is a harbinger of arguments made by proponents of creation science a decade later, *see infra* text accompanying notes 81–82, Justice Black wrote:

> If the theory [of evolution] is considered anti-religious . . . how can the state be bound by the Federal Constitution to permit its teachers to advocate such an "anti-religious" doctrine to schoolchildren? . . . Since there is no indication that the literal Biblical doctrine of the origin of man is included in the curriculum of Arkansas schools, does not the removal of the subject of evolution leave the State in a neutral position toward these supposedly competing religious and anti-religious doctrines? Unless this Court is prepared simply to write off as pure nonsense the views of those who consider evolution an anti-religious doctrine, then this issue presents problems under the Establishment Clause far more troublesome than are discussed in the Court's opinion . . . .
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> . . . .
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> Certainly the Darwinian theory, precisely like the Genesis story of the creation of man, is not above challenge. In fact the Darwinian theory has not merely been criticized by religionists but by scientists . . . .

Id. at 113–14.

Justice Stewart opined that the Arkansas statute should be held void for vagueness because teachers could reasonably read it to prohibit them even from mentioning Darwinian theory, which "would clearly impinge upon the guarantees of free communication contained in the First Amendment . . . ." *Id.* at 116 (Stewart, J., concurring). For a similar theory in a recent case concerning scientific creationism, *see infra* note 344.

81. *See, e.g.*, Whitehead & Conlan, *supra* note 18, at 46–54.

establishment clause by promoting the religion of secular humanism and inhibiting religious faith in biblical creation. Moreover, they argue that the public schools' teaching of evolution violates the free exercise rights of students and parents who have a religious faith in biblical creation. To eliminate these alleged violations of the religion clauses, it is argued, evolution may not be the only theory concerning origins that is taught in the public schools; if evolution is taught, the argument proceeds, the creation theory of origins must also be taught.[82]

Legislation requiring the "balanced treatment" of evolution and creation science has recently been introduced in many state legislatures.[83] In addition, creation science advocates have been lobbying state textbook selection committees to choose texts that discuss this theory.[84] To date, four reported judicial decisions have resulted from this recent groundswell of activism to delete evolution from, or add creation science to, public school curricula.[85]

A. Wright v. Houston Independent School District[86]

In *Wright*, students sought to enjoin the teaching of evolution theory and the use of textbooks that presented evolution theory either without discussing other theories of origins, or "without critical analysis."[87] The plaintiffs alleged that in teaching a theory inimical to their religious belief in creation, the school was at least implicitly

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82. This theory was set forth in Note, *Freedom of Religion and Science Instruction in Public Schools*, 87 YALE L.J. 515 (1978) [hereinafter cited as Note]. The Note's author, Wendell Bird, later became counsel to the Institute for Creation Research, an organization that promotes the teaching of creationism in the public schools. *See* McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255, 1261 (E.D. Ark. 1982). Mr. Bird has also represented parties defending the teaching of creationism in particular lawsuits. *See, e.g.*, Aguillard v. Edwards, 765 F.2d 1251, 1252 (5th Cir. 1985) (Mr. Bird was Special Assistant Attorney General for Louisiana and defended its "balanced treatment" statute); McLean v. Arkansas's Bd. of Educ., 529 F. Supp. 1255, 1261 n.11 (E.D. Ark. 1982) (court denied Mr. Bird's attempt to participate in litigation through representation of certain individuals who sought to intervene as defendants; these individuals supported Arkansas balanced treatment statute).

83. Cole & Scott, *Creation-Science and Scientific Research*, 63 PHI DELTA KAPPAN 557, 557 (1982) (balanced treatment legislation had been introduced in 19 states in past five years).

84. McKoun, *"Scientific" Creationism: Axioms and Exegesis*, 2 FREE INQUIRY 23, 23 (1981).

85. In addition, two unreported decisions have considered similar rationales in reviewing challenges to public school biology textbooks that contained information about evolution or creation theory. In Willoughby v. Stever, plaintiff challenged National Science Foundation grants given to the Biological Sciences Curriculum Study to prepare biology texts for public school students. Plaintiff argued that because the texts presented evolution as the only reliable theory of origins, thus undermined his religious beliefs. The court dismissed the action, noting that there had been no allegation of coercion. Civil Action No. 1574-72 (D.D.C., Aug. 25, 1972) (memorandum and order) (denying request for three-judge court); (D.D.C. May 18, 1973) (order) (dismissing action for reasons stated in prior order), *aff'd without opinion*, 504 F.2d 271 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 927 (1975). This case is also discussed *infra* note 242. In Hendren v. Campbell, No. S577-0139 (Super. Ct. Ind. Apr. 14, 1977), the Indiana Superior Court held that the establishment clause was violated by the Indiana Textbook Commission's adoption of a biology textbook in which the only theory of origins presented favorably was creationism. The court concluded that the Commission's purpose in adopting the book was the promotion of fundamentalist Christian doctrine.

The balanced treatment rationale for adding instruction in creation science to public school curricula has also been rejected by two state attorneys general. Balanced Treatment for Scientific Creationism and Evolution Act, Op. Att'y Gen. No. 79-126 at 179, 186, 194 (S.C. Nov. 8, 1979) (because creation science is "most probably a religious doctrine," balanced treatment legislation would "most probably . . . violate the First Amendment"); Public Funds for Textbooks Presenting Evolutionary Theory of Origin Only—"Neutrality Requirements" in First Amendment, 58 Op. Att'y Gen. 262, 263, 270 (Cal. 1975) (no court would require Board of Education to give balanced treatment to creation science because of its "status as a religious belief").

86. 366 F. Supp. 1208 (S.D. Tex. 1972), *aff'd per curiam*, 486 F.2d 137 (5th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974).

87. 366 F. Supp. at 1208.

rejecting that religious belief, thus burdening their free exercise rights. Plaintiffs further contended that the schools were lending their official support to the "religion of secularism," thus violating the establishment clause.[88]

The Houston schools offered to excuse the objecting students from instruction in evolution.[89] However, the students declined to exercise this option, contending that doing so would be tantamount to the coerced expression of their religious beliefs. Instead, they proposed either that evolution be eliminated from the curriculum or that the curriculum grant "equal time" to all theories regarding origins. As the *Wright* court noted, the Supreme Court in *Epperson* had already held unconstitutional the option of eliminating evolution from school curricula for the purpose of avoiding conflict with certain religious beliefs. As for plaintiffs' alternative proposed "equal time" remedy, the court found it unworkable, because it would be impossible to include every theory of origins within the school curriculum, and the court did not consider itself qualified to select among them. The court also noted that the rationale supporting an equal time requirement for theories of origins compatible with particular religious beliefs might well warrant equal time requirements for other theories compatible with other religious beliefs, such as the Mormon belief in racial inequality, or the Christian Science belief that health and disease are not governed by medical science.[90]

In addition to finding plaintiffs' proposed remedies objectionable, the *Wright* court also concluded that plaintiffs were not entitled to any remedy. This conclusion rested upon two principal grounds. First, the court found that the teaching of evolution had too "tenuous" a connection to religion to invoke the protection of the first amendment's religion clauses. Commenting that "[s]cience and religion necessarily deal with many of the same questions, and they may frequently provide conflicting answers," the court characterized the challenged textbooks as scientific in nature and only "peripheral to the matter of religion."[91] Second, the court concluded that neither the teaching of evolution nor the use of textbooks referring to evolution inhibited plaintiffs' exercise of their religion or promoted any other religion. In support of this conclusion, the court noted that plaintiff students did not claim they had been denied the opportunity to challenge their teachers' presentation of the evolution theory.[92]

B. Daniel v. Waters[93]

In *Daniel*, the Court of Appeals for the Sixth Circuit held unconstitutional a Tennessee statute that it described as "a 1974 version of the legislative effort to suppress the theory of evolution which produced the famous *Scopes* 'monkey trial' of

88. *Id.* at 1209.

89. *Id.* at 1211–12 & n.7.

90. *Id.* at 1211 n.6.

91. *Id.* at 1211.

92. *Id.* at 1210. Accordingly, at least with respect to a theory that is "peripheral to religion," the *Wright* court's view appears to be that a state may approve textbooks espousing only one theory, and direct its teachers to present in class only one theory, so long as students are not prohibited from challenging that theory. In contrast, establishment clause principles would require more protection for the religious freedom of public school students exposed to textbooks and teachers espousing only one religious theory than whatever protection might be afforded by the students' theoretical ability to challenge their textbooks and teachers. *See infra* text accompanying notes 145–85.

93. 515 F.2d 485 (6th Cir. 1975).

1925."[94] The statute at issue in *Daniel* provided, specifically, that no textbook presenting a view about the origins of man or his world could be used in the Tennessee public schools unless it expressly stated that such view was a theory, and not scientific fact. However, the law declared that "the Holy Bible shall not be defined as a textbook . . . and shall not be required to carry the disclaimer provided for textbooks." The statute further provided that any textbook presenting a theory of origins must give "commensurate attention to, and an equal amount of emphasis on . . . other theories, including . . . the Genesis account in the Bible." However, the legislation expressly prohibited the teaching of "all occult or satanical beliefs of human origin."[95]

The Sixth Circuit held this statute facially unconstitutional because it resulted in "a clearly defined preferential position for the Biblical version of creation as opposed to any account of the development of man based on scientific research and reasoning."[96] The court quoted extensively from the Supreme Court's opinion in *Epperson*,[97] which it regarded as directly controlling. As the Sixth Circuit explained, the Tennessee legislature, just like the Arkansas legislature, had "select[ed] from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine."[98]

C. McLean v. Arkansas Board of Education[99]

Much as the *Daniel* case involved Tennessee's successor statute to the one at issue in the earlier *Scopes* case, so the *McLean* case involved Arkansas' successor statute to the one at issue in the earlier *Epperson* case. According to the *McLean* court, the 1981 Arkansas "balanced treatment" statute it was reviewing[100] reflected the same fundamentalist convictions that had given rise to the anti-evolution statutes involved in *Scopes* and *Epperson*.

Based in part upon a thorough consideration of the historical background leading to Arkansas' enactment of the 1981 statute, the court concluded that the statute's

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94. *Id.* at 486–87. John Scopes, a Tennessee public school teacher, was tried and convicted of violating a state law prohibiting the teaching of evolution. The Tennessee Supreme Court upheld Scopes' conviction, as well as the Tennessee anti-evolution law. Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927). The *Daniel* opinion commented that although the latter-day version of the statute at issue in *Scopes* "sought to avoid direct suppression of speech and eschewed direct criminal sanctions . . . the purpose of establishing the Biblical version of the creation of man over the Darwinian theory of the evolution of man is as clear in the 1973 statute as it was in the statute of 1923." *Id.* at 487.

95. *Id.*

96. *Id.* at 489.

97. *Id.* at 489–90 (quoting *Epperson*, 393 U.S. at 103–05, 106–07). For a summary of the Supreme Court's rationale in *Epperson*, *see supra* note 80. The Sixth Circuit found the challenged Tennessee statute unconstitutional for the additional reason that its exclusion of "occult" or "satanical" theories of origins would lead to impermissible entanglement between religion and the state, "inextricably involv[ing] the State Textbook Commission in the most difficult and hotly disputed of theological arguments," and it would impermissibly prefer all other religions over those in the excluded categories. *Id.* at 491.

98. *Id.* at 489–90. Because the Sixth Circuit remanded the *Daniel* case to the district court for the granting of proper relief, the district court also had an opportunity to comment on the statute's unconstitutionality. Expressing its view that the statutory requirement of equal attention to all theories of origins was "patently unreasonable," the district court noted that "[e]very religious sect, from the worshippers of Apollo to the followers of Zoroaster, has its belief or theory" concerning origins. 399 F. Supp. 510, 512 (M.D. Tenn. 1975).

99. 529 F. Supp. 1255 (E.D. Ark. 1982).

100. 1981 Ark. Acts 590, §§ 1–11 (codified at ARK. STAT. ANN. §§ 80–1663 to 1670 (Supp. 1981)).

purpose was to advance the religious beliefs of Christian fundamentalists. The court noted that the fundamentalist movement had its very inception, in the nineteenth century, in "evangelical Protestantism's response to . . . Darwinism."[101] The court explained that in the 1960's, there was a resurgence of concern among fundamentalists about society's growing secularism, and a renewed emphasis upon the biblical Book of Genesis as the sole source of knowledge about origins.[102]

In the 1960's and 1970's, as the court explained, several fundamentalist organizations were formed to promote the idea that the Book of Genesis is supported by scientific data, coining the terms "creation science" and "scientific creationism." The *McLean* court then chronicled the efforts by these creationist organizations to introduce creation science into the public schools "as part of their ministry."[103] The Arkansas statute at issue in *McLean* resulted from these efforts, precisely tracking a model act that had been prepared by one of the creation science organizations.[104] The model act, as well as Arkansas' version of it, essentially mandated that public schools "give balanced treatment to creation-science and to evolution-science."[105]

In addition to the Arkansas statute's historical background, other evidence also supported the court's conclusion that the statutory purpose was to advance religion. For example, the citizens who sought legislative sponsorship of the model act did so for an avowedly sectarian purpose; the statute's author had publicly proclaimed its sectarian purpose; and its passage was preceded by no legislative investigation or consultation with any educators or scientists.[106]

Even apart from the historical background and circumstances surrounding the passage of the Arkansas statute, the *McLean* court further concluded, based solely upon the statutory language, that it had the purpose and effect of advancing particular religious beliefs. The court concluded that the act's definition of "creation science" embodied concepts that were "not merely similar to the literal

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101. 529 F. Supp. at 1258.

102. *Id.* at 1259.

103. *Id.* at 1260.

104. *Id.* at 1260–63.

105. *Id.* at 1256. The Arkansas act defines creation-science as follows:

"Creation science" includes the scientific evidences and related inferences that indicate: (1) Sudden creation of the universe, energy, and life from nothing; (2) The insufficiency of mutation and natural selection in bringing about development of all living kinds from a single organism; (3) Changes only within fixed limits of originally created kinds of plants and animals; (4) Separate ancestry for man and apes; (5) Explanation of the earth's geology by catastrophism, including the occurrence of a worldwide flood; and (6) A relatively recent inception of the earth and living kinds.

ARK. STAT. ANN. § 80–1666(a) (Supp. 1981). The Act defines "evolution-science" as:

. . . includ[ing] the scientific evidences and related inferences that indicate: (1) Emergence by naturalistic processes of the universe from disordered matter and emergence of life from non-life; (2) The insufficiency of mutation and natural selection in bringing about development of present living kinds from simple earlier kinds; (3) [Emergence] by mutation and natural selection of present living kinds from simple earlier kinds; (4) Emergence of man from a common ancestor with apes; (5) Explanation of the earth's geology and the evolutionary sequence by uniformitarianism; and (6) An inception several billion years ago of the earth and somewhat later of life.

ARK. STAT. ANN. § 80–1666(b) (Supp. 1981).

106. 529 F. Supp. at 1264.

interpretation of Genesis," but moreover, were "identical and parallel to no other story of creation."[107] The court further observed that the idea of the creation of the world "out of nothing" is "the ultimate religious statement because God is the only creator."[108]

The conclusion that the statute's primary effect was to advance religion was buttressed by the court's finding that creation science has "no scientific merit or educational value."[109] In support of this finding, the court cited the following evidence: the "two-model approach"[110] of scientific creationism has no factual scientific basis, but rather mirrors the fundamentalist view that one must either accept a literal reading of Genesis or else believe in a godless system of evolution;[111] not one recognized scientific journal has published an article espousing the creation science theory, nor did defendants produce any such article for which publication had been refused;[112] some proponents of creation science concede that it is not a science, contending instead that both creation science and evolution are religious;[113] whereas a scientific theory must always be subject to revision or abandonment in light of inconsistent facts, creation science is dogmatic and absolutist;[114] and in response to a public school teachers' testimony that she could not locate any scientific materials for teaching creation science, defendants did not produce any material that they claimed to be suitable for this purpose.[115]

In an effort to demonstrate that the balanced treatment of evolution and creation science does have a secular purpose and effect, defendants argued that the exclusive teaching of evolution infringes the religious freedom of students and parents who believe in the biblical account of creation. Therefore, defendants contended, the act's purpose and effect are to avoid violations of the first amendment's religion clauses. The court rejected this theory, however, without much discussion. It reasoned chiefly that even assuming the exclusive teaching of evolution did violate the first amendment's religious freedom guarantees, the appropriate remedy would be to stop

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107. *Id.* at 1265.

108. *Id.* Defendants argued that teaching the existence of God is not religious unless the teaching seeks a commitment. However, the *McLean* court rejected this contention as contrary to both common understanding and settled case law. *Id.* at 1266. That ruling is correct. The existence of a deity is inherently a matter of religious faith. *See, e.g.*, Malnak v. Yogi, 440 F. Supp. 1284, 1322 (D.N.J. 1977), *aff'd*, 592 F.2d 197 (3d Cir. 1979) ("[C]oncepts concerning God or a supreme being . . . are manifestly religious" and "do not shed that religiosity merely because they are presented as philosophy or as a science.") Even if those who teach religious doctrine do not seek express professions of adherence from their pupils, their purpose is nevertheless to secure adherence. The establishment clause bars any efforts by public schools to convert students to certain religious beliefs. That such efforts may not succeed does not save them from unconstitutionality. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (state policy or action would violate establishment clause if it had purpose of advancing religion, even if its effect were purely secular).

109. 529 F. Supp. at 1272.

110. *Id.* at 1266.

111. *Id.*

112. *Id.* at 1268.

113. *Id.*

114. *Id.* at 1269.

115. *Id.* at 1272.

teaching evolution. In addition, the court said, "it is clearly established in case law . . . that teaching evolution does not violate the establishment clause."[116]

D. Aguillard v. Edwards[117]

1. *Panel Decision*

In this case, which the Supreme Court will review during its 1986–87 Term, the district court entered a summary judgment invalidating Louisiana's version of the model balanced treatment act.[118] Characterizing the case as "simple,"[119] a panel of the Fifth Circuit Court of Appeals affirmed this judgment. The panel ruled that the statute violated the establishment clause because its purpose was to promote religious belief. As the *McLean* court had done in invalidating Arkansas' version of the model act, the *Aguillard* panel based its conclusion that the statute had a religious purpose in part upon the statute's historical background, and in part upon the court's view that creation theory is essentially religious, even if it is supported by some scientific evidence.[120]

Rejecting the state's contention that the statutory purpose was to promote academic freedom, the Fifth Circuit panel explained that, far from advancing academic freedom, the act actually undermined it:

> Academic freedom embodies the principle that individual instructors are at liberty to teach that which they deem to be appropriate in the exercise of their professional judgment. The principle of academic freedom abjures state interference with curriculum or theory as antithetical to the search for truth. . . . [T]he compulsion inherent in the Balanced Treatment Act is, on its face, inconsistent with the idea of academic freedom as it is universally understood.[121]

The Fifth Circuit panel found further evidence that Louisiana's balanced treatment act had no actual secular purpose, but only a religious one, in the fact that it required the teaching of creation science only when evolution was also taught. The court reasoned that if the Louisiana legislature had genuinely sought to advance creation science as a science, it would have required the inclusion of this subject in curricula regardless of whether evolution was also included.[122]

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116. *Id.* at 1274. The court's rejection of defendants' religious freedom claims probably explains its failure to analyze other remedies that could be invoked if defendants' religious freedom were in fact infringed by the exclusive teaching of evolution. In addition to the one remedy suggested by the court (deleting evolution from the curriculum) and the one provided by the statute (the balanced treatment of evolution and creation), another possible option would have been to exempt from instruction in evolution individual students whose religious beliefs would be violated by such instruction. This exemption remedy was offered in the *Wright* case. *See supra* text accompanying note 89; *see also infra* text accompanying notes 293 and 353.

117. 765 F.2d 1251 (5th Cir. 1985), *probable jurisdiction noted*, 106 S. Ct. 1946 (1986).

118. 1981 La. Acts 685 (codified at LA. REV. STAT. ANN. §§ 17:286.1–.7 (West Supp. 1982)).

119. 765 F.2d at 1253.

120. *Id.* at 1256. The *Aguillard* opinion also parallels the *McLean* opinion in failing to discuss thoroughly the theory that the statute's purpose and effect were to promote the religious freedom of students or parents who believed in creation. In fact, because the *Aguillard* opinion does not even mention the potential free exercise concerns of these students and parents, they may not have been asserted. *See infra* text accompanying note 348.

121. *Id.* at 1257.

122. *Id.* The court also concluded that the statutory focus on "the religious *bete noire* of evolution" further

2. *Dissent from Denial of Petition for Rehearing En Banc*

Although the Fifth Circuit Court of Appeals denied defendants' petition for a rehearing en banc, it did so by only the smallest possible majority, in an eight-to-seven vote.[123] The opinion dissenting from the denial of the petition was strongly worded, taking sharp exception to the panel's rationale. The dissenters characterized the panel's decision as undermining, rather than advancing, fundamental first amendment principles:

> The panel reasons that by requiring public school teachers to present a balanced view of the current evidence regarding the origins of life and matter . . . rather than that favoring one view only and by forbidding them to misrepresent as established fact views on the subject which today remain theories only, the statute promotes religious belief and violates the academic freedom of instructors to teach whatever they like.
>
> The *Scopes* court upheld William Jennings Bryan's view that states could constitutionally forbid teaching the scientific evidence for the theory of evolution, rejecting that of Clarence Darrow that truth was truth and could always be taught—whether it favored religion or not. By requiring that the whole truth be taught, Louisiana allied itself with Darrow; by striking down that requirement, the panel holding allies us with Bryan.[124]

The dissent acknowledged that the impetus for enacting the balanced treatment statute emanated largely from religious hostility to evolutionary theory. However, the dissent also noted that the record contained affidavits from scientists who described themselves as agnostics and adherents of evolutionary theory, but who nevertheless maintained that some scientific evidence supports other theories of origins, which are less inconsistent with fundamental Protestantism. According to the dissent, in the context of a summary judgment motion, these assertions mandated the conclusion that scientific creationism has a legitimate scientific basis.[125]

The dissent further maintained that so long as the balanced treatment act required the teaching of "full scientific truths," any religious purpose or effect of such requirement should not detract from its legitimacy.[126] Additionally, the dissent argued that even if the statutory purpose was in part religious, the statute should still not be invalidated, because its specific aim was to preserve religious freedom. As the dissent described that purpose, it was "to prevent the closing of children's minds to religious doctrine by misrepresenting it as in conflict with established scientific laws."[127]

The en banc dissenters' views concerning the religious freedom of parents and students who believe in biblical creation appear to diverge sharply from those of the panel. The panel did not even expressly address these religious freedom concerns or consider any potential measure for accommodating them, such as exempting individual students from instruction in evolution. In stark contrast, the en banc dissenters seem to assume that the religious freedom concerns of individual students or parents may

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demonstrated that its "intended effect is to discredit evolution by counterbalancing its teaching at every turn with the teaching of creationism, a religious belief." *Id.*

123. 778 F.2d 225 (5th Cir. 1985) (en banc).

124. *Id.* at 225–26.

125. *Id.* at 226.

126. *Id.* at 228.

127. *Id.*

justify not only accommodation measures directly affecting only the religiously objecting students, but also curricular requirements directly affecting all students.

The sharp split within the Fifth Circuit in *Aguillard*, much like the Sixth Circuit's reversal of the district court's rulings in *Mozert*, underscores the lack of judicial consensus concerning disputes about secular humanism or scientific creationism in public school curricula. As the first step toward formulating principles for resolving such disputes, the following Part of the Article examines the two sets of Supreme Court precedent that are most closely on point.

III. Supreme Court Precedents Concerning Judicial Intervention in Public School Curricula

A. *Judicial Deference to State and Local Authorities Regarding Curricular Decisions*

The Supreme Court has long recognized that "public education in our nation is committed to the control of state and local authorities," and that "local school boards have broad discretion in the management of school affairs."[128] Accordingly, the Court has repeatedly emphasized that federal courts should not ordinarily "intervene in the resolution of conflicts which arise in the daily operation of school systems." Rather, the Court has sanctioned judicial intervention in such conflicts only when they "directly and sharply implicate basic constitutional values."[129] Judicial deference to educational decisions by state and local officials reflects several important traditions and concerns, including: preserving local democratic control over educational policy; protecting teachers' academic freedom; and maintaining policies that comport with the views of educational experts.[130]

In addition to the justifications for judicial deference to any decisions by state or local officials concerning educational policy in general, there is another justification for judicial deference to such decisions concerning curricular content in particular. That additional justification stems from the public schools' acknowledged role "in the preparation of individuals for participation as citizens," and in "inculcating fundamental values necessary to the maintenance of a democratic political system."[131] To enable the public schools to carry out this "vitally important" role, the Supreme Court has said that state and local officials must be given latitude "to

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128. Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 863–64 (1982) (first quote is from *Epperson*, 393 U.S. at 104).

129. *Epperson*, 393 U.S. at 104.

130. *See, e.g.*, Keiter, *Judicial Review of Student First Amendment Claims: Assessing the Legitimacy-Competency Debate*, 50 Mo. L. Rev. 25, 26 (1985) [hereinafter cited as Keiter] (school boards, as locally elected bodies, are reflective of and responsive to will of local community; school officials are better situated than courts to make discretionary judgments that characterize educational policy-making; courts lack resources and expertise available to professional educators and elected officials; courts may be unable to develop and articulate suitable standards for resolving educational issues); Sexton, *Minority-Admissions Programs After Bakke*, 49 Harv. Educ. Rev. 313, 320–22 (1979) (discussing reasons underlying judicial recognition that educational institutions should be allowed "considerable discretion" in conducting educational affairs).

131. Ambach v. Norwick, 441 U.S. 68, 76–77 (1979). *Accord*, Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (education "is a principal instrument in awakening the child to cultural values").

establish and apply [the public school] curriculum in such a way as to transmit community values . . . ."[132] The Court has also said that state and local authorities may shape public school curricula to "promote[ ] respect for . . . traditional values be they social, moral, or political."[133]

Notwithstanding the Supreme Court's general disapproval of judicial intervention in public school curricular decisions, it has cautioned that "the discretion of the state and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment."[134] The Court has been the most willing to approve judicial invalidation of curricular decisions when undertaken to protect students' rights under the first amendment's religion clauses. It has approved judicial invalidation of curricular decisions to protect students' free speech rights only under significantly narrower circumstances.

On the basis of the free speech clause,[135] the Supreme Court has protected the rights of public school students themselves to engage in[136] or to refrain from[137] certain in-school expression. However, the Court has held that the free speech clause gives students only limited protection from curricular decisions that could indirectly chill their freedom of thought or expression.[138] In contrast, pursuant to the establishment clause, the Court has invalidated any public school curricular decisions that could potentially chill students' religious freedom. The Court's relatively great willingness to sanction judicial nullification of curricular decisions that potentially influence students' religious beliefs is paralleled by the relatively lenient evidentiary standards it applies in evaluating such decisions.

B. *Limited Judicial Intervention to Curb Governmental Influence Upon Non-Religious Beliefs*

Only one Supreme Court case expressly discusses the circumstances under which courts may invalidate public school curricular decisions that could indirectly curb students' free speech interests: *Board of Education, Island Trees Union Free School District v. Pico*.[139] Although the *Pico* Court could not agree upon a majority

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132. *Pico*, 457 U.S. at 864.

133. *Id. See also* Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. 3159, 3165 (1986) (holding that first amendment did not prevent school from disciplining high school students for using sexually suggestive language in speech nominating another student for student government office at school assembly, noting that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board").

134. *Id.*

135. U.S. CONST. amend. I: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The free speech clause is binding upon the states. Near v. Minnesota, 283 U.S. 679, 707 (1931).

136. Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 509 (1969) (holding that schools could restrict students' expressive conduct only based upon specific evidence demonstrating that such conduct would "substantially interfere with the work of the school or impinge upon the rights of other students").

137. West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), discussed *infra* text accompanying notes 194–97.

138. In holding that a public school teacher's rights of free expression do not include the right to proselytize students about a particular viewpoint, some lower courts have implied that the students have a right to remain free from a teacher's indoctrination. *See infra* note 255. However, the author is unaware of any case directly holding that a student has such a right. In any event, the Supreme Court has never recognized any such right.

139. 457 U.S. 853 (1982). As noted *supra*, text accompanying notes 136–37, two other Supreme Court decisions have upheld public school students' related rights to engage in, or to refrain from, free speech themselves.

opinion, the plurality held that public secondary school students have only a limited free speech right of access to diverse ideas in a school library. According to the plurality, a decision to remove books from the library would violate this limited right only if the dispositive factor motivating the decisionmakers was an intent to deny students access to ideas with which the officials disagreed.[140] If, however, the decisive factor motivating the decisionmakers was the educational suitability of the books in question, the plurality opined that the removal decision would not violate the students' free speech rights, because it "would not carry the danger of an official suppression of ideas."[141] The Supreme Court remanded the *Pico* case to the district court for a determination of the dispositive factor that had motivated the school board's decision to remove the books at issue, which the board characterized as "anti-American, anti-Christian, anti-Semitic, and just plain filthy."[142]

Difficult as it would be to satisfy *Pico*'s standard for successfully challenging a decision to remove school library books on free speech grounds, dicta in *Pico* signal that the Court might impose an even higher burden upon parties seeking to invalidate, on free speech grounds, either the addition of books to a school library, or the addition or removal of books in a school's prescribed in-class curriculum. Stressing that the students' selection of books from a school library is voluntary, the *Pico* plurality rejected the school officials' argument that they have absolute discretion concerning the library's contents.[143] In contrast, however, the Court said that the school officials "might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values."[144]

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140. 457 U.S. at 871 & n.22. *Cf.* Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (in striking down state statute criminalizing use of contraceptive, under which doctor and Planned Parenthood personnel had been convicted for giving information on contraception, the Court noted that state may not "contract the spectrum of available knowledge").

141. 457 U.S. at 871 & n.22.

142. *Id.* at 857.

143. *Id.* at 869.

144. *Id.* (emphasis in original). For a further indication that the *Pico* Court endorsed substantial judicial deference to public school officials' decisions concerning the addition of library books and the addition or removal of curricular books, *see also id.* at 862.

Although the *Pico* plurality indicated that students' right of access to diverse ideas is entitled to greater protection in the school library than in the curriculum, several considerations favor the opposite conclusion. As the *Pico* plurality itself stressed, the students' use of the school library is optional, and their reading of any particular library book is voluntary. *Id.* at 869. In contrast, most public school students are required to attend schools under state compulsory education statutes, and they must read the books that are included in the school's curriculum as a matter of assignment, rather than voluntary choice. For these reasons, students attending public school classes constitute a captive audience, whose free speech rights should accordingly be given greater, not lesser, protection. *See infra* text accompanying notes 202–04. Because school students are young and relatively impressionable, subject to the influence of authority figures such as teachers, they are particularly likely to be influenced by a teacher's actual or implied approval of certain beliefs. *See infra* text accompanying notes 205–09. A teacher's selection and assignment of books advocating certain opinions may lead a student to infer that the teacher approves of the opinions, with the result that the student is influenced to adopt such opinions, and to abandon inconsistent ones. Teachers can take steps to dispel any suggestion that they endorse particular opinions advocated in assigned books, or that students should adopt any such opinions. *See infra* text accompanying notes 255–56. However, the courts should recognize the significant risk of indoctrination or suppression of ideas in the classroom setting, and invoke first amendment principles to counter this risk. *See generally infra* Part IV.

To be sure, as *Pico* stresses, the Supreme Court regards the inculcation of certain traditional values—including social, political, and moral values—as a legitimate, and even desirable, function of the public school curriculum. 457 U.S. at 864. Nevertheless, free speech concerns must impose some limits upon the inculcation that will be tolerated in a classroom, just as they do within the school library. The examples of library book removals that would be invalid because they are motivated by impermissibly partisan or narrow criteria, according to the *Pico* plurality, include a Democratic school board's removal, motivated by party affiliation, of all books written by or in favor of Republicans, or

C. *Expansive Judicial Intervention to Curb Governmental Influence Upon Religious Beliefs*[145]

1. *Cases Invalidating Curricular Decisions That Could Influence Religious Beliefs*

In every case in which the Supreme Court has considered public school curricular decisions that could indirectly influence students' religious beliefs, the Court has found a violation of the establishment clause, even absent any direct attempt to influence such beliefs. Specifically, the Court has held that the establishment clause was violated by the following decisions regarding curricula: to institute a "released time" program whereby religious teachers provided religious instruction in public school classrooms during the school day to students electing to attend (even though student attendance was optional);[146] to mandate organized prayer[147] or Bible readings[148] in the classroom, with teachers leading or participating (even though individual students could be excused upon request); to prohibit the teaching of the Darwinian theory of evolution, which was inconsistent with the views espoused by certain religions (even though the religious views were not required to be taught);[149] to require the posting of copies of the Ten Commandments on classroom walls (even though the copies bore notes explaining that the Ten Commandments constitute a major source of secular law);[150] and to require a "moment of silence" for purposes of meditation or prayer (even though no student was compelled to use the moment for prayer).[151] In describing the rationale underlying this line of cases, Professor Laurence Tribe commented:

> [Public schools are] the facilities through which basic norms are transmitted to our young. It is thus unsurprising that no major religious activity, however voluntary, has been allowed to take place in these facilities, through which we inculcate values for the future.[152]

Even putting aside the question of whether secular humanism and scientific creationism are religious doctrines,[153] the issue of whether these subjects may be

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a white school board's removal, motivated by racial animus, of all books written by blacks, or advocating racial equality. *Id.* at 870–71. If transposed to the curricular setting, surely these hypothesized book removals would still raise grave free speech concerns. *See* Keiter, *supra* note 130, at 84 (1985) (*Pico* standards should be extended to decisions concerning library book acquisition and curricular book acquisition and removal).

For the foregoing reasons, this Article proposes a single set of standards for evaluating all curricular decisions that affect public school students' religious beliefs, regardless of whether the decisions have an impact on the school library or on its in-class curriculum.

145. Some of the ideas discussed in this section were previously explored in Strossen, *A Framework for Evaluating Equal Access Claims by Student Religious Groups: Is There a Window for Free Speech in the Wall Separating Church and State?*, 71 CORNELL L. REV. 143 (1985).

146. Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948). *But see* Zorach v. Clauson, 343 U.S. 306 (1952) (upholding "released time" program whereby, on written request of parents, public school students may leave premises and go to religious institutions for religious instruction, while other students remain in classrooms).

147. Engel v. Vitale, 370 U.S. 421 (1962).

148. School Dist. v. Schempp, 374 U.S. 203 (1963).

149. Epperson v. Arkansas, 393 U.S. 97 (1968). The rationales underlying this decision are discussed *supra* note 80.

150. Stone v. Graham, 449 U.S. 39 (1980) (*per curiam*).

151. Wallace v. Jaffree, 105 S. Ct. 2479 (1985). This decision is discussed *infra* text accompanying notes 174–78.

152. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14–5, at 825 (1978) [hereinafter cited as L. TRIBE].

153. Whether secular humanism and scientific creationism are appropriately classified as religious may in many

taught in the public schools is not necessarily governed directly by the foregoing Supreme Court decisions. That is because, as Professor Tribe observed, in each of these cases, the school was functioning in its inculcative or indoctrinating capacity. The invalidated curricular elements were generally devotional in form, involving the rote incantation of prescribed words or rituals, rather than free discussion and inquiry. Therefore, reasonable students would have viewed these aspects of the curriculum as embodying school-approved beliefs, rather than beliefs that the students could choose to analyze, question, and potentially reject. In contrast, in teaching secular humanism or creation science, a public school could at least potentially function in its capacity as the stimulator of analysis and inquiry, creating a marketplace of ideas.[154] Instruction in secular humanism and scientific creationism may differ in form from the religious components of school curricula that were invalidated in previous Supreme Court decisions, because it could consist of intellectual discourse rather than ritualistic incantation.[155]

The Supreme Court has never ruled directly on the constitutionality of a school's teaching *about* religion, as distinguished from its instruction *in* religion. Dicta in several Supreme Court decisions indicate that the Court would not invalidate a school's presentation of religious beliefs or concepts in the context of neutral, objective courses about, for example, history or culture.[156] In such a context, religious beliefs would not be presented in an inculcative mode, with the purpose or effect of inducing the students to accept them. Rather, the beliefs would be presented in an analytical mode, with the purpose or effect of inducing the students to examine, question and perhaps even criticize them. Therefore, the establishment clause concerns underlying the Supreme Court's prior rulings invalidating public school curricular decisions that could indirectly influence students' religious beliefs—in all of which the schools functioned in an inculcative capacity—would not necessarily mandate invalidation of similar decisions concerning religious expression in an

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cases not be determinative of whether the establishment clause permits their inclusion in public school curricula. *See infra* note 217.

154. As the Supreme Court has repeatedly recognized, our nation's public school system aims to fulfill a dual role: not only to inculcate the majoritarian views and values deemed necessary for participation in the responsibilities of citizenship, *see, e.g., Pico*, 457 U.S. at 864, but also to provide a "marketplace of ideas," stimulating free individual inquiry. *See, e.g., id.* at 868.

155. Under the standards proposed in this Article, an important factor in determining the constitutionality of instruction in secular humanism, scientific creationism, or any other matter that could influence a student's religious beliefs is the extent to which it is taught in an analytical mode, as distinguished from an inculcative mode. *See infra* text accompanying notes 253–56.

156. *See, e.g., Schempp*, 374 U.S. at 225:

> [I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.

Accord, Stone, 449 U.S. at 42 (Ten Commandments could constitutionally be integrated into school curriculum, "in an appropriate study of history, civilization, ethics, comparative religion, or the like"); *Epperson*, 393 U.S. at 106 (establishment clause would probably permit "study of religions and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program of education" in public schools). *See also Schempp*, 374 U.S. at 306 (Goldberg, J., concurring) (establishment clause prohibits "teaching of religion" in public school, but not "teaching *about* religion") (emphasis in original).

appropriately analytical course. This conclusion is reinforced by the rationales reflected in these prior Supreme Court rulings.

The Court's general mode of establishment clause analysis has undergone several changes between 1948,[157] when it rendered its first decision concerning religious influences in public school curricula, and 1985,[158] when it issued the most recent. However, the Court's essential concerns about the dangers to establishment clause values[159] posed by any public school curricular decision that could influence students' religious beliefs have remained constant throughout these general doctrinal developments. The Court's chief concern has consistently been that including any religious material in school curricula entails a risk that students could perceive the school to be supporting religion.[160] The Court has repeatedly expressed a concern that, because of young people's relative impressionability or vulnerability, they might be more likely than adults to perceive any religious aspect of the curriculum as manifesting the school's approval of religion.[161] The Court has also consistently expressed the fear that students adhering to a minority religion or no religion might

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157. *McCollum*, 333 U.S. 203.

158. *Wallace*, 105 S. Ct. 2479.

159. For a statement of the interests protected by the establishment clause, *see, e.g., Engel*, 370 U.S. at 430–31:

> The Establishment Clause, unlike the Free Exercise Clause, does not depend on any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. This is not to say, of course, that laws officially prescribing a particular form of worship do not involve coercion of such individuals.

Accord, Schempp, 374 U.S. at 256 (Brennan, J., concurring):

> [T]he role of the Establishment Clause [is] as a co-guarantor, with the Free Exercise Clause, of religious liberty. The Framers did not entrust the liberty of religious beliefs to either clause alone. The Free Exercise Clause "was not to be the full extent of the Amendment's guarantee of freedom from governmental intrusion in matters of faith."

(Quoting McGowan v. Maryland, 366 U.S. 420, 464 (1961) (Frankfurter, J., concurring). *See also* Schwarz, *supra* note 16, at 720: (establishment clause protects against "imposition danger"–*i.e.*, that government will influence choice of religion; "essential danger is that family's right to determine religious beliefs of its members, especially its children, will be undermined").

160. For example, Professor Tribe observed that *McCollum, Engel* and *Schempp* reveal the view that, in public schools, the establishment clause is violated by "the combination of material, organizational and, above all, *symbolic* support for" religion. L. TRIBE, *supra* note 152, § 14–5, at 825 (emphasis in original). In the context of public school religious expression, as in other contexts, the Court has held that the establishment clause is violated when the government bestows even an intangible benefit upon religion, in the form of an "imprimatur" of approval. *See, e.g.*, Larkin v. Grendel's Den, Inc., 459 U.S. 116, 125–26 (1982): "[T]he mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some . . . ."

161. *See, e.g., McCollum*, 333 U.S. at 227 (Frankfurter, J., concurring):

> The [released time] arrangement thus presents powerful elements of inherent pressure by the school system in the interest of religious sects . . . . That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school. . . . The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend.

Accord, e.g., Marsh v. Chambers, 463 U.S. 783, 792 (1983) (distinguishing between adults not susceptible to "religious indoctrination" and children subject to "peer pressure"); *Schempp*, 374 U.S. at 299–300 (Brennan, J., concurring) (suggesting that invocational prayers in legislative chambers, in contrast with teacher-led school prayers, may not violate establishment clause because "[l]egislators . . . are mature adults who may presumably absent themselves . . . without incurring any penalty, direct or indirect"). Even Justice Stewart, the lone dissenter in *Schempp*, acknowledged that "the dangers of coercion involved in the holding of religious exercises in a school room differ qualitatively from those presented by the use of similar exercises or affirmations in ceremonies attended by adults." 374 U.S. at 316. *See also infra* note 180 (quoting recent Supreme Court opinion concerning young students' particular susceptibility to religious indoctrination); *infra* note 205 and accompanying text (regarding young people's relative impressionability and its implications in other constitutional law contexts).

feel particularly alienated, or be particularly susceptible to indoctrination pressures, as a result of such perceived approval.[162]

From at least 1971 until 1984, the touchstone in all establishment clause cases was the tripartite test first specifically enunciated in *Lemon v. Kurtzman*.[163] Under the *Lemon* test, no governmental policy or practice can survive establishment clause scrutiny unless it satisfies every one of the following three tests: it has a clearly secular purpose; its primary effect neither advances nor inhibits religion; and it does not foster excessive entanglements between government and religion.[164]

In its 1984 decision in *Lynch v. Donnelly*, the Supreme Court announced that it would no longer necessarily employ the *Lemon* analysis in all establishment clause cases.[165] The Supreme Court has also recently indicated that it would generally confine the entanglement prong of the *Lemon* test to cases involving government aid to religious institutions.[166] Nevertheless, the Court's recent establishment clause

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162. *See, e.g., Engel*, 370 U.S. at 431:

> When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.

Accord, e.g., McCollum, 333 U.S. at 227–28 (Frankfurter, J., concurring):

> The children belonging to these non-participating sects [in the released time program] will thus have inculcated in them a feeling of separatism when the school should be a training ground for habits of community, or they will have religious instruction in a faith which is not that of their parents. As a result, the public school system . . . sharpens the consciousness of religious differences at least among some of the children committed to its care.

163. 403 U.S. 602 (1971).

164. *Id.* at 612–13. The Court had first enunciated the secular purpose and primary effect criteria in *Schempp*, 374 U.S. at 222, and the excessive entanglement criterion in Walz v. Tax Comm'n, 397 U.S. 663, 674 (1978). In a recent decision, the Court emphasized that any challenged policy or practice must have a "clearly secular purpose." Wallace v. Jaffree, 105 S. Ct. 2479, 2490 (two places) (1985) (holding unconstitutional Alabama's statute authorizing daily period of silence in public schools for voluntary meditation or prayer).

165. Lynch v. Donnelly, 465 U.S. 668, 679 (1984). However, the *Lynch* opinion evaluated the state-sponsored nativity scene at issue under the *Lemon* criteria. Moreover, it neither articulated an alternative analysis nor stated under what circumstances it would invoke any alternative analysis. Justice O'Connor's concurring opinion expressly announced a "clarified version of the *Lemon* test." *See infra* text accompanying notes 171–73. In concluding that the *Lynch* nativity scene satisfied the *Lemon* criteria, both the plurality and concurring opinions subjected the scene to a relatively low level of scrutiny, relying heavily upon the pervasiveness and alleged historical acceptance of the nativity scene in American society. *See generally* Note, *The Lemon Test Soured: The Supreme Court's New Establishment Clause Analysis*, 37 VAND. L. REV. 1175 (1984).

166. As the Supreme Court has often observed, some degree of entanglement between government and religion is inevitable. Therefore, only a high degree of entanglement will be deemed "excessive" or impermissible. The concept of excessive entanglement was first enunciated in Walz v. Tax Comm'n, 397 U.S. 664 (1970). Chief Justice Burger, who authored the majority opinion, noted that if religious institutions were not exempt from property taxes, there would be excessive and continuous entanglement when tax collectors went to each such institution and examined it to determine the amount of assessment. *Id.* at 672–80. This form of excessive entanglement has been referred to as "administrative entanglement." Justice Harlan, concurring in *Walz*, added the notion that the level of entanglement is impermissible if it engenders a risk of politicizing religion. "What is at stake," he asserted, "is preventing that kind and degree of government involvement in religious life that . . . is apt to lead to strife and frequently strain a political system to the breaking point." *Id.* at 694. This form of excessive entanglement has been referred to as "political entanglement," as distinguished from "administrative entanglement." *Id.* at 694.

Lemon itself, which involved direct financial aid to parochial schools, was the next case implicating entanglement concerns. Again writing for the majority, Chief Justice Burger noted that the direct aid at issue would have required "comprehensive, discriminating and continuing state surveillance" over parochial schools, their teachers, and their materials. 403 U.S. at 619. Additionally, adopting Justice Harlan's concept in *Walz*, *Lemon* expressed concern that the successive annual appropriations at issue would create political divisiveness along religious lines. *Id.* at 620.

In Mueller v. Allen, 463 U.S. 388, 403–04 n.11 (1983), the Court cautioned that the "elusive inquiry" into political divisiveness should be confined to a narrow category of cases involving governmental aid to religious institutions. Justice O'Connor has urged that the administrative entanglement inquiry should be applied, if at all, only to the same narrow

decisions manifest the continuing vitality of its earlier rulings regarding public school curricular decisions that could influence religious beliefs. This conclusion is supported by the fact that the *Lynch* plurality opinion cited and distinguished all of these prior decisions.[167] It is further supported by the Court's sole post-*Lynch* decision concerning public school religious expression, *Wallace v. Jaffree*.[168]

The Supreme Court's longstanding goal of insulating public school students from any apparent governmental endorsement of religion, which constituted the foundation for all of its prior decisions involving public school curricular decisions that could influence religious beliefs, was perpetuated in both *Lynch* and *Wallace*. In *Lynch*, this non-endorsement theme is most clearly expressed in Justice O'Connor's concurring opinion,[169] which has regularly been quoted and applied in subsequent Supreme Court decisions.[170] Under Justice O'Connor's "clarified version" of the *Lemon* test,[171] the central issue is whether the challenged governmental action is either intended to convey a message of governmental approval or disapproval of religion, or is likely to be perceived as conveying such a message.[172] Although this inquiry turns in part on the particular facts involved in any situation, Justice O'Connor views it as ultimately a legal question, appropriate for judicial resolution.[173] The Supreme Court's opinion in *Wallace* cited both the original *Lemon* test

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category of parochial aid cases. Aguilar v. Felton, 105 S. Ct. 3232, 3247–48 (1985) (O'Connor, J., dissenting) (purpose and effect should be only establishment clause tests; *Lemon*'s entanglement prong should no longer afford basis for sustaining establishment clause challenge); *Lynch*, 465 U.S. at 687–88 (O'Connor, J., concurring) (excessive entanglement should be proscribed only in context of governmental aid to religious institutions). Justices Rehnquist and White, as well as Chief Justice Burger, would probably join Justice O'Connor in supporting outright abrogation of the entanglement test. *See, e.g., Aguilar*, 105 S. Ct. at 3242 (Burger, C.J., dissenting); *id.* at 3243 (Rehnquist, J., dissenting); Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216, 3248–49 (1985) (White, J., dissenting).

Even the narrow majority of Justices who are unwilling to jettison the entanglement test have indicated that its primary application should be in cases involving governmental aid to parochial schools or other religious institutions. *See, e.g., Aguilar*, 105 S. Ct. at 3237–39 (in holding that impermissible entanglement was created by federally funded programs under which public school teachers provided remedial instruction in religious schools, Court repeatedly stressed parochial character and "pervasively sectarian environment" of institutions receiving government aid).

In light of the foregoing narrowing construction of *Lemon*'s entanglement prong, it seems unlikely that a public school's curricular decision would be held to violate the establishment clause for causing excessive entanglement. Therefore, this Article's discussion of the establishment clause standards for evaluating curricular decisions focuses on *Lemon*'s purpose and effect prongs. *See, e.g., infra* text accompanying note 218. It is nonetheless possible that a governmental action or policy concerning public school curricula could be found to cause excessive entanglement. *See, e.g., supra* note 97; *infra* note 351.

167. *See Lynch*, 465 U.S. at 672–87.

168. 105 S. Ct. 2479 (1985) (mandatory moment of silence in public schools "for meditation or voluntary prayer"). Bender v. Williamsport Area School Dist., 106 S. Ct. 1326 (1986), also involved religious expression in a public school—specifically, prayer, Bible reading, and other religious expression by a group of high school students who met voluntarily during the school's "student activity period." However, the Court did not reach the merits of the case, instead vacating the lower court's judgment on jurisdictional grounds.

169. 465 U.S. at 687.

170. *See, e.g., Grand Rapids*, 105 S. Ct. at 3226 (Brennan, J., writing for majority); *Wallace*, 105 S. Ct. at 2490 n.41, 2492–93 n.52 (Stevens, J., writing for majority). Justice O'Connor's concurrence attempts to fill the gap created by the plurality's failure to articulate an alternative to the *Lemon* test, which it had discredited at least to some extent. *See supra* note 165 and accompanying text.

171. 465 U.S. at 688 n.1 (O'Connor, J., concurring).

172. *Id.* at 691.

173. *Id.* at 693–94:

> [W]hether a government activity communicates endorsement of religion is not a question of simple historical fact. Although evidentiary submissions may help answer it, the question is, like the question whether racial or sex-based classifications communicate an invidious message, in large part a legal question to be answered on the basis of judicial interpretation of social facts.

and Justice O'Connor's refined *Lemon* test.[174] Accordingly, it struck down the challenged moment of silence statute because it concluded that the statute was intended to convey governmental approval of religion.[175]

Several of the *Wallace* opinions expressly recognize that the establishment clause might permit some mandatory moments of silence.[176] This recognition has particularly significant implications for controversies concerning the inclusion in public school curricula of secular humanism, creation science, or other materials that could influence a student's religious beliefs. The opinions that expressed this view also stated that school students are more vulnerable and impressionable than adults.[177] Consequently, the Justices who joined in these opinions evidently believe that, notwithstanding students' relative impressionability or immaturity, they are nevertheless capable of understanding the distinction between a school's endorsement of religious expression and its neutral provision of an opportunity during which students may, if they choose, engage in such expression. If the students can make this distinction, they should be equally capable of distinguishing between a school's endorsement of a religious belief and its neutral presentation of information related to a religious belief that the students may, if they choose, accept or reject.

In sum, although *Lynch v. Donnelly* may mark the erosion of establishment clause doctrine in certain respects, the Court's subsequent decisions, including *Wallace v. Jaffree*, make clear that it will still enforce that guarantee with special vigilance in reviewing public school curricular decisions that could influence students' religious beliefs.[178] The Court will probably scrutinize any such decision under the first two parts of the *Lemon* test,[179] and strike it down if it is intended or

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See also Wallace, 105 S. Ct. at 2501 (O'Connor, J., concurring in judgment) ("The relevant issue is whether an objective observer acquainted with the text, legislative history, and implementation of the statute would perceive it as state endorsement of prayer in public schools."

Majority opinions of the Supreme Court have also recognized that whether certain circumstances give rise to an establishment clause violation constitutes a mixed question of law and fact, appropriate for judicial determination. *See supra* note 10.

174. 105 S. Ct. at 2492–93 n.52.

175. *Id.* at 2492–93. Therefore, at least the six Justices who joined the *Wallace* judgment agree that the key inquiry in evaluating religious elements of public school curricula is whether the government either intends to, or is perceived as, endorsing religion.

176. 105 S. Ct. at 2491 (majority opinion); *id.* at 2493 (Powell, J., concurring) and 2496 (O'Connor, J., concurring).

177. 105 S. Ct. at 2492 n.51 (majority opinion) (quoting previous Supreme Court decisions stressing that children are more subject to religious indoctrination and peer pressure than adults); *id.* at 2495 n.9 (Powell, J., concurring); *id.* at 2503 (O'Connor, J., concurring).

178. The Court's special concern for preventing any reasonable inference that the public schools support religion was also manifested in its two recent decisions invalidating the provision of remedial instruction to parochial school students by using a public school's rooms or teachers. *Grand Rapids*, 105 S. Ct. 3216; *Aguilar*, 105 S. Ct. 3232. These decisions are discussed *infra* text accompanying notes 181–85.

179. The Supreme Court has consistently applied at least the first two elements of the tripartite *Lemon* test in post-*Lynch* establishment clause decisions, notwithstanding *Lynch*'s declaration that it would not necessarily do so. *See* Witters v. Washington Dep't of Services for the Blind, 106 S. Ct. 748, 751 (1986); *Grand Rapids*, 105 S. Ct. at 3222; *Aguilar*, 105 S. Ct. at 3238 (1985); *Wallace*, 105 S. Ct. at 2489–90; Estate of Thornton v. Caldor, 105 S. Ct. 2914, 2917 (1985); Tony and Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290. And the Court noted, in a decision subsequent to *Lynch*, that it has "particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children." *Grand Rapids*, 105 S. Ct. at 3222 (1985).

The Court's two recent decisions that have rejected establishment clause challenges without rigorously enforcing the *Lemon* standards both considered practices with long histories of widespread public acceptance. *Lynch*, 465 U.S. 668 (state-sponsored nativity scene displayed during Christmas holiday season); Marsh v. Chambers, 463 U.S. 783 (1983)

perceived to convey governmental approval or disapproval of religion. However, *Wallace* also indicates that the Court will not necessarily view any curricular decision that could influence students' religious beliefs as failing this test, notwithstanding students' relative immaturity and impressionability.

2. *Evidentiary Standards for Evaluating Religious Influences in Public Schools*

Consistent with the Supreme Court's relative tolerance of judicial intervention in public school curricula to invalidate curricular decisions that could influence students' religious beliefs, the Court has regularly ruled that such decisions violate the establishment clause without much, if any, specific evidence that reasonable students perceived the school to be endorsing religion. The Court seems so eager to prevent any religious indoctrination in public schools that it strikes down any curricular decision with the mere potential for influencing students' religious beliefs, even absent evidence that it has in fact done so.[180]

The two "parochiaid" decisions that the Court issued in 1985 illustrate its relatively lenient evidentiary standards for finding an establishment clause violation in cases "involving the sensitive relationship between government and religion in the education of our children."[181] The Court invalidated certain governmental assistance programs, under which public school employees taught secular subjects in parochial schools, because of its general apprehension that the teachers "*may* well subtly (or overtly) conform their instruction to the environment in which they teach," causing a prohibited "indoctrinating effect."[182] On the basis of this potential establishment clause violation, the Court struck down the programs, even though there was no specific evidence that the feared indoctrination had actually occurred during the

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(state-paid legislative chaplain). The Court has explained that the existence and acceptance of a practice when the establishment clause was adopted evidences the Framers' understanding that such practice did not violate this constitutional provision. *See, e.g., Marsh*, 463 U.S. at 790.

The circumstances in which the Court has applied an historically-oriented establishment clause standard are not present with respect to the inclusion of secular humanism or scientific creationism in public schools. Although efforts to influence religious beliefs in U.S. public schools may have a long history, they have never been widely accepted. To the contrary, the Supreme Court has struck down every such effort that it has considered. *See supra* text accompanying notes 146–51. *See also Schempp*, 374 U.S. at 271 (Brennan, J., concurring) ("Almost from the beginning, religious exercises in the public schools have been the subject of intense criticism, vigorous debate, and judicial or administrative prohibition.") Nor could it plausibly be argued that the Framers intended religious influences in public school curricula to pass establishment clause muster, because public schools were nonexistent when the Constitution was adopted. *See id.* at 236 n.5.

180. For a typical statement regarding the establishment clause dangers inherent in the public school setting, which is based upon general presumptions rather than specific evidence, *see, e.g.*, the following passage from Justice O'Connor's concurrence in *Wallace*:

> . . . Presidential proclamations are distinguishable from school prayer in that they are received in a non-coercive setting and are primarily directed at adults, who presumably are not readily susceptible to unwilling religious indoctrination. This Court's decisions have recognized a distinction when government sponsored religious exercises are directed at impressionable children who are required to attend school, for then government endorsement is much more likely to result in coerced religious beliefs.

105 S. Ct. at 2503. *See also supra* note 161 (Supreme Court decisions distinguishing children's susceptibility to religious indoctrination from that of adults); *infra* note 205 (regarding young people's relative impressionability and its implications in other constitutional law contexts).

181. *Grand Rapids*, 105 S. Ct. at 3222; *see also Aguilar*, 105 S. Ct. at 3244–48 (O'Connor, J., dissenting).

182. *Grand Rapids*, 105 S. Ct. at 3225 (emphasis added).

twenty-year period of the programs' operation.[183] Expressly acknowledging "the lack of evidence of specific incidents of indoctrination," the Court dismissed it as "of little significance,"[184] and concluded that "[t]he symbolic union of church and state inherent in [the challenged programs] *threatens* to convey a message of state support for religion. . . ."[185]

IV. Proposed Establishment Clause Standards for Reviewing Curricular Decisions

A. *Problems with Current Dual Standard for Protecting Students' Religious and Non-Religious Beliefs*

As demonstrated in Part III of this Article, separate standards have evolved for judicial review of public school curricular decisions to curb governmental influence upon non-religious and religious beliefs, respectively. These separate standards result in substantially greater protection being accorded to students' freedom to form and maintain religious beliefs, independently of curricular influences, than to their freedom to form and maintain non-religious beliefs.[186]

With respect to public school students' religious beliefs, but not their non-religious beliefs, a curricular decision will be held unconstitutional if its primary effect is promotion, or its primary effect is inhibition, or its purpose is promotion. It is true that a curricular decision will be held unconstitutional if its purpose is to suppress students' non-religious beliefs, as well as their religious beliefs. However, even this standard affords more protection to public school students' religious beliefs than to their non-religious beliefs. With respect to students' non-religious beliefs, a curricular decision will be invalidated only if there is a dispositive purpose of

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183. *Id.; see also Aguilar*, 105 S. Ct. at 3244 (O'Connor, J., dissenting): "The abstract theories explaining why on-premises instruction might possibly advance religion dissolve in the face of experience in New York."

184. *Grand Rapids*, 105 S. Ct. at 3226.

185. *Id.* at 3230 (emphasis added). The sharp distinction between the Court's attitude toward public school indoctrination in religious and non-religious beliefs, respectively, is underscored by contrasting the evidentiary standards applied in the two contexts. As discussed *supra* text accompanying notes 181–85, the Court invalidates curricular decisions because of the potential danger that they would indoctrinate students with religious beliefs, even absent any specific evidence that this feared danger would actually materialize. In stark contrast, the Court upheld a statute prohibiting aliens from teaching in public schools because of the potential danger that aliens would *not* indoctrinate students in certain non-religious beliefs, even absent any specific evidence that this feared danger would actually materialize. Ambach v. Norwick, 441 U.S. 68, 75–80 (1979) (excluding alien teachers is rationally related to public schools' legitimate interests, because such teachers might not adequately teach civic virtues, role of citizen, and appropriate attitudes toward government and political process).

186. This disparity is criticized in Arons & Lawrence, *The Manipulation of Consciousness: A First Amendment Critique of Schooling*, 15 Harv. C.R.—C.L.L. Rev. 309, 319 (1980) [hereinafter cited as Arons & Lawrence]:

> Although recognizing the danger of inculcation of religious values . . . in schools, the Court has failed to consider the first amendment implications involved when equally basic but nonreligious values form a part of the philosophy established by a school and communicated to its students.

and id. at 325:

> [T]he imposition of secular values may constitute as significant an interference with first amendment values as the imposition of religious beliefs. Yet, except when dealing with overt instances of value inculcation such as the flag salute, the Court has left the establishment of other ideologies untouched.

Cf. J. Coons, Nonpublic School Aid 48 (E. West ed. 1976) (in describing disparity between protection accorded public school students' religious beliefs and that accorded their non-religious beliefs, asks whether Thomas Jefferson "[w]ould . . . perhaps grieve that the First Amendment reads 'religion' instead of 'ideology'").

suppression specifically because of disagreement with the beliefs. With respect to students' religious beliefs, in contrast, a curricular decision will be invalidated so long as its primary purpose is to inhibit the beliefs.[187]

This sharp divergence in the degree of protection afforded to religious and non-religious beliefs in the public school setting is problematical for several reasons. First, this dichotomous analysis attaches undue significance to a distinction that is elusive at best and arbitrary at worst. Although reams have been written on the subject, neither the courts[188] nor the commentators[189] have reached a consensus

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187. These comparative standards regarding students' religious and non-religious beliefs are derived, respectively, from *Lemon* and its progeny, and *Pico*. Under *Lemon* and its progeny, a public school's decision to include or exclude material in either a library or classroom setting will violate the establishment clause whenever its purpose or primary effect is to promote or inhibit religion. *See supra* text accompanying notes 163–78 and note 166. In contrast, under *Pico*, a public school's decision to exclude material from a school library will violate the free speech clause only if the dispositive factor motivating the decisionmakers was the intent to suppress ideas contained in the material because the decisionmakers disagreed with them. *See supra* text accompanying notes 139–44. Moreover, under *Pico*, a school's decision to include material in a library, or to include or exclude material in a classroom, may be permissible *even if* the dispositive factor motivating the decisionmakers was the intent to suppress ideas contained in the material because the decisionmakers disagreed with them. *See supra* note 144 and accompanying text.

188. For a thorough synopsis of judicial efforts to define religion, *see* Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056, 1060–66 (1978) [hereinafter cited as Harvard Note]. Until fairly recently, the courts defined religion in terms of such traditional elements as theology, sacraments, and worship of a deity. *See, e.g.*, Davis v. Beason, 133 U.S. 333 (1890). In 1961, however, in Torcaso v. Watkins, 367 U.S. 488 (1961), the Court unanimously held that the establishment clause was violated by a provision of the Maryland Constitution under which a Secular Humanist was denied appointment as a notary public, because he refused to declare belief in God. Reasoning that the establishment clause prohibits government from aiding theistic faiths vis-a-vis nontheistic ones, the Court listed as examples of protected nontheistic religions Buddhism, Taoism, Ethical Culture, and Secular Humanism. *Id.* at 495 & n.11.

The Court indicated that the constitutional definition of "religion" would be even further extended in two cases construing section 6(j) of the Universal Military and Service Act of 1948, 50 U.S.C. App. § 456(j) (West 1981), which exempted certain conscientious objectors with a belief "in a relation to a Supreme Being." Welsh v. U.S., 398 U.S. 333 (1970); U.S. v. Seeger, 380 U.S. 163 (1965). In *Seeger*, the Court held that where a "sincere and meaningful belief . . . occupies in the life of its possessor a place parallel to that filled by the [orthodox belief in] God . . . ," such belief should be considered to satisfy the statutory standard. 380 U.S. at 176. Although the *Seeger* ruling was phrased in terms of statutory construction, it "appears to have been constitutionally required." Harvard Note, *supra* note 188, at 1064. In *Welsh*, the Court further extended the constitutional definition of religion that it implicitly approved in *Seeger*. It held that the claimant's purely ethical and moral tenets should be deemed religious. Furthermore, it held that an exemption should be denied only if the claimant's system of beliefs does "not rest *at all* upon moral, ethical, or religious principle but instead rests *solely* upon considerations of policy, pragmatism, or expediency." 398 U.S. at 342–43 (emphasis added).

The lack of clarity in the definitions of religion suggested in *Seeger* and *Welsh* is compounded by the Court's subsequent apparent retrenchment from those relatively broad definitions in Wisconsin v. Yoder, 406 U.S. 205 (1972), discussed *infra* text accompanying notes 269–79. In *Yoder*, the Court indicated that the protection of the religion clauses depends, at least to some extent, on an individual's membership in an established, organized sect. *See infra* note 274 & accompanying text.

189. *See, e.g.*, L. TRIBE, *supra* note 152, § 14–16, at p. 828 ("[A]ll that is '*arguably religious*' should be considered religious in a free exercise analysis. . . . [but] anything '*arguably non-religious*' should not be considered religious in applying the establishment clause.") (emphasis in original); Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579, 612–13 [hereinafter cited as Choper I] (because free speech clause, as construed by Supreme Court, disposes of almost all problems covered by free exercise clause, religion can be defined relatively narrowly, focusing on functional considerations and historic values); Freeman, *The Misguided Search for the Constitutional Definition of "Religion,"* 71 GEO. L.J. 1498 (1983) (no single feature or set of features is common to all religions, or distinguishes religion from everything else; however, religions do have a set of paradigmatic features); Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753 (1984) (courts should decide whether something is religious by comparison with the indisputably religious, in light of particular legal problem involved; no single characteristic should be regarded as essential to religiousness); Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817, 832 (1984) ("[N]o definition of religion for constitutional purposes exists, and no satisfactory definition is likely to be conceived"); Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805 (whether particular group is religious, for establishment

concerning a comprehensive definition of religion for purposes of the first amendment's religion clauses.

In addition to the definitional problem, there is also a more fundamental problem with attaching significant constitutional consequences to the religious/non-religious distinction. Indeed, the definitional problem itself reflects an underlying philosophical problem: why should a particular category of individual beliefs be more protected from governmental influence than any other categories of individual beliefs?

To be sure, the establishment clause in terms prohibits the government only from establishing religion. Nowhere does the Constitution contain a corresponding express prohibition upon the government's establishment of any non-religious ideology. However, the establishment clause itself does not explicitly prohibit the government from influencing the individual's process of forming, maintaining, and expressing religious beliefs. Rather, that commonly accepted understanding of the establishment clause's function has resulted from judicial interpretation, which in turn reflects the underlying purposes that are implicit in the provision's express terms.[190] The first amendment's free speech clause has undergone a parallel process of judicial interpretation. In light of the underlying purposes that are implicit in the free speech clause's express terms, that provision is now widely understood to limit governmental influence upon adults in the process of forming, maintaining, and expressing non-religious beliefs.[191] Indeed, it has been urged that the free speech clause should be interpreted as containing an implicit anti-establishment provision, which would limit the government's influence over an individual's non-religious beliefs to the same extent that the explicit establishment clause now limits the government's influence over an individual's religious beliefs.[192]

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clause purposes, should turn primarily on group's perception of itself); Toscano, *supra* note 16, at 207 (religion should be defined broadly to include any belief, theory, or viewpoint that addresses fundamental questions concerning deity, purpose of universe, foundations of knowledge, or other matters of faith or ideological preference, beyond proof); Harvard Note, *supra* note 188, at 1089 (for free exercise clause purposes, religion should be given expansive functional definition, embracing whatever is "ultimate concern" for individual; for establishment clause purposes, religion should be given narrower interpretation, adverting to operational criteria such as doctrinal systematization and organizational stability and coherence); Note, *The Sacred and the Profane: A First Amendment Definition of Religion*, 61 TEX. L. REV. 139 (1982) (defines religion as any system of beliefs that distinguishes "sacred" from "profane"); Note, *The Myth of Religious Neutrality by Separation in Education*, 71 VA. L. REV. 127, 152 (1985) (when government regulates activity whose principal purpose is to advance ideas, "religion" should be defined expansively, but when government regulates other activity, "religion" should be defined more narrowly).

190. *See generally* Note, *Toward a Uniform Valuation of the Religion Guarantees*, 80 YALE L.J. 77 (1970) [hereinafter cited as Note] (establishment clause intended to protect free adoption, observance, and propagation of religious beliefs).

191. *See, e.g.*, van Geel, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 TEX. L. REV. 197, 260–61 [hereinafter cited as van Geel]:

> [T]he Supreme Court has strongly protected the interests of adults in freedom of belief, and this protection is firmly grounded in the first amendment's aims to protect self-government, to promote the values of self-fulfillment, to advance knowledge, to achieve a more adaptable society, and to encourage participation in decisionmaking . . . .

It has been argued that the protection accorded adults' process of belief formation should be extended to public school students as well. *See, e.g., id.* at 262 ("[T]he impairment of the student's interest in freedom of belief should be measured by the same standards used to measure the rationales for government policies that impair adults' freedom of belief"); Arons & Lawrence, *supra* note 186, at 312 (1980) (emphasis in original) ("To implement . . . the first amendment in the world of universal, institutionalized education requires a broadening of the amendment's traditional protection of *expression* of belief and opinion to embrace *formation* of belief and opinion").

192. *See, e.g.*, Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104

That it is both impractical and illogical to draw any sharp distinction between religious and other beliefs, in terms of the constitutional protection they should receive, is underscored by the fact that the Supreme Court has often equated the two. In many cases, the Court has dealt collectively with freedom of belief, conscience, and thought, treating them as closely interrelated aspects of the individual autonomy that the Constitution insulates from governmental control or influence.[193] Indeed, the Court has equated freedom of thought and conscience with freedom of religious belief specifically in the public school context. In *West Virginia Board of Education v. Barnette*,[194] which held that schools cannot compel Jehovah's Witness school children to salute the American flag, the Court declared that the individual conscience cannot be subjected to any state-imposed dogma.[195] Although the particular reason that the children cited for choosing to refrain from the flag salute was their religious belief that the salute constituted idolatry,[196] the Court's decision did not rely specifically on the free exercise clause or concepts of religious freedom. Rather, in broad language, it upheld freedom of individual belief or thought on all matters, religious or otherwise, within "the sphere of intellect and spirit."[197]

(1979) [hereinafter cited as Kamenshine] (proposes that courts read first amendment to contain implied prohibition against political establishment, because government's participation in dissemination of political ideas poses distinctive threat to open public debate); *see also* Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 655 (1980) [hereinafter cited as Shiffrin] ("The establishment clause applies only to religion, but if government's activities as non-religious speaker were entirely beyond first amendment control, major and unacceptable incursions on liberty and equality would be effected."). *Cf.* Gard, *The Flag Salute Cases and the First Amendment*, 31 CLEVELAND ST. L. REV. 419, 427–28 (1982) ("The proper analogy from the freedom of religion clause to the freedom of speech clause would seem obvious; the former is designed to prohibit governmentally imposed religious orthodoxy and the latter clause prohibits governmentally imposed political orthodoxy.").

193. *See, e.g.*, Wallace v. Jaffree, 105 S. Ct. 2479, 2487 (1985) ("[T]he Court has identified the individual's freedom of conscience as the central liberty that unifies the various clauses in the First Amendment."); Wooley v. Maynard, 430 U.S. 705, 714 (1977) (requirement that motor vehicles bear license plates embossed with state motto, "Live Free or Die," violates first amendment, because government may not compel individual to display message unacceptable to his beliefs on his property):

> A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of "individual freedom of mind."

(Quoting West Virginia Bd. of Educ. v. Barnette, 319 U.S. at 637.) *Accord, e.g.*, Gillette v. United States, 401 U.S. 437, 445 (1971) (Statutory exemption of religious conscientious objectors from military service reflects "respect for the general proposition that fundamental principles of conscience and religious duty may sometimes override the demands of the secular state"). *See also* Choper I, *supra* note 189, at 610 ("The freedom of expression and association guarantees of the first amendment impose some significant, albeit as yet sketchily defined, limitations on the government's ability to support, or require citizens to support, particular beliefs or groups—whether or not their teachings or tenets are generally considered to be 'religious.'"); L. TRIBE, *supra* note 152, § 15–5, at 899–900:

> The Constitution has enumerated specific categories of thought and conscience for special treatment: religion and speech. Courts have at times properly generalized from these protections, together with the guarantees of liberty in the due process clauses of the fifth and fourteenth amendments, to derive a capacious realm of individual conscience, and to define a "sphere of intellect and spirit" constitutionally secure from the machinations and manipulations of government.

194. 319 U.S. 624 (1943).

195. *See also* Bellotti v. Baird, 443 U.S. 622, 638 (1979) (plurality opinion) (regarding states' role in public education, vis-a-vis parental rights, noted that "affirmative sponsorship of particular ethical, religious, or political beliefs is something we expect the State *not* to attempt in a society constitutionally committed to the ideal of individual liberty") (emphasis in original).

196. *Barnette*, 319 U.S. at 629.

197. *Id.* at 642. *See id.* at 634–35, 642:

> Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this

Barnette and the other authorities referred to in this section may well support a sound argument that the first amendment should protect public school students from governmental influence over all matters of belief or conscience, even if they are wholly non-religious in nature.[198] These authorities might also support a sound argument that all individuals, in all settings, should be protected from governmental influence upon their beliefs or thoughts.[199] However, it is not necessary to reach such relatively far-ranging conclusions to resolve disputes concerning the role in public school curricula of secular humanism, scientific creationism, or any other subject implicating beliefs that are at least arguably religious. For these purposes, it suffices to note that the foregoing authorities provide support for the following relatively modest proposition: that the first amendment should afford public school students some protection from governmental influence upon beliefs that are at least arguably religious.[200] This proposition is further supported by certain

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case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual . . . .

. . . .

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein . . . .

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

The Court's expansive dicta in *Barnette* have subsequently been qualified by the narrower holdings in *Pico*, discussed *supra* text accompanying notes 139–44, as well as in Wisconsin v. Yoder, discussed *infra* text accompanying notes 269–79. *Pico* and *Yoder* are inconsistent with at least the thrust, if not the holding, of *Barnette*. *See generally* Note, *Freedom and Public Education: The Need for New Standards*, 50 NOTRE DAME LAWYER 530, 538 (1975):

Unqualified, *Barnette* leads inexorably to the abolition not only of the compulsory flag salute but also of compulsory education: school officials are permitted to educate only by persuasion, never by compulsion. Yet the Court has never contemplated abolishing compulsory school attendance. This refusal to follow *Barnette* to its logical conclusion has imposed upon the Court a particularly difficult conceptual problem: justifying compelled school attendance or discipline while refusing to accept the fact that the legislature can define common obligations of citizenship to which private actions—even those founded on "religion"—can be ordered.

198. *See, e.g.*, Arons & Lawrence, *supra* note 186, at 325, 360 (1980) ("The Supreme Court has eliminated religious indoctrination in public schools but . . . the imposition of secular values may constitute as significant an interference with first amendment values as the imposition of religious beliefs"; advocates "the separation of school and state"); Emerson & Haber, *The Scopes Case in Modern Dress*, 27 U. CHI. L. REV. 522 [hereinafter cited as Emerson & Haber] (new measures are needed to protect first amendment values in public schools, which constitute closed system where attendance is compulsory and government itself determines content; one possible measure would be balanced presentation requirement); van Geel, *supra* note 191, at 261 ("[T]he basic reasons that support protecting children's freedom of religious belief also extend to nonreligious belief"). *See also supra* note 191; *infra* note 200.

199. *See, e.g.*, Choper I, *supra* note 189, at 612 ("[F]or the state (through its schools or otherwise) to attempt to convince its people . . . of the 'ultimate truth' of the teachings of Dewey or Hegel—or Keynes or Friedman, or Luther or Christ—should be unconstitutional wholly apart from the establishment clause"); Kamenshine, *supra* note 192, at 1153 (courts should read first amendment as containing implied political establishment clause, which would prohibit government advocacy of political viewpoints and unequal government assistance to private political dissemination); Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863 [hereinafter cited as Yudof] (government's considerable power to inform and lead polity is potentially destructive of citizenry's independent judgment, and may threaten processes of democratic consent; therefore, need to limit government expression should inform all first amendment adjudication).

200. The type and degree of protection that should be afforded are discussed *infra* Parts IV D, V C, and V D. *See generally* Choper I, *supra* note 189, at 612:

Even if the "ultimate truth" promoted by the public school did not invoke any "extratemporal consequences," and thus the program would not violate the establishment clause using that definition of religion, nonetheless, such ideological partisanship by government would readily be held to abridge the broader protections of the first amendment.

See also infra note 210.

special attributes of public schools and their students,[201] discussed in the following section.

B. *Special Characteristics of Public Schools and Students Warranting Broad Definition of Students' Beliefs That Should be Protected from Governmental Influence*

Most public school students constitute a captive audience, because they are required to attend school in general, and any class in particular, by virtue of the state's compulsory education laws and the school's internal rules, respectively.[202] First amendment doctrine has long recognized that captive audience members have a particularly important interest in avoiding exposure to expressions of beliefs, ideas, or words that they consider offensive.[203] This doctrine is rooted in the notion that the physical captivity of captive auditors should not result in their psychic captivity. In a setting such as a public school, where the government is the speaker, the captive audience doctrine is specifically concerned with protecting captive auditors' freedom of thought from undue governmental influence.[204] Because of their physical captivity, captive audience members cannot take the generally available action for avoiding exposure to unwanted expression—walking away from it. Therefore, the law protects the only alternative means by which captive auditors can avoid exposure to offensive expression—preventing the offensive expression from being directed to them. With respect to governmental expression, in a public school curriculum, of ideas offensive to arguably religious beliefs, this approach would be implemented by

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201. Some critics of public schools' power to mold student beliefs suggest that this power can be diminished only through a radical restructuring of the school system, and that increasing the protection of students' first amendment rights would not suffice. *See* Arons & Lawrence, *supra* note 186, at 354–56. John Stuart Mill argued that the molding of individual thought was an inevitable result of public education, which he therefore opposed altogether:

> [S]tate-sponsored education . . . is a mere contrivance for moulding people to be exactly like one another; and as the mould in which it casts them is that which pleases the predominant power in the government, whether this be a monarch, a priesthood, an aristocracy, or the majority of the existing generation, in proportion as it is efficient and successful, it establishes a despotism over the mind . . . .

J. Mill, On Liberty 190–91 (1859).

202. Most states require everyone to attend school until they have attained the age of 16. *See* M. Guggenheim & A. Sussman, The Rights of Young People 306 (1985). Because of this compulsory education requirement, courts and commentators have expressly characterized school students as captive audience members, *see, e.g.*, Mailloux v. Kiley, 323 F. Supp. 1387, 1392 (D. Mass. 1971), *aff'd*, 448 F.2d 1242 (1st Cir. 1971); L. Tribe, *supra* note 152, § 15–5, at 901 ("Each public school represents an association thrust upon children by a combination of statutory obligation and economic circumstances, yielding a classic 'captive audience'"); Yudof, *supra* note 199, at 874–75, 902.

203. *See generally, e.g.*, Black, *He Cannot Choose But Hear: The Plight of the Captive Auditor*, 53 Colum. L. Rev. 960 (1953); Haiman, *Speech v. Privacy: Is There a Right Not to be Spoken to?*, 67 N.W. U. L. Rev. 153 (1972); Note, *"I'll Defend to the Death Your Right to Say It . . . But Not to Me"—The Captive Audience Corollary to the First Amendment*, 1983 S. Ill. L. J. 211.

204. *See, e.g.*, T. Emerson, The System of Freedom of Expression 711 (1970) ("[T]he principle that the government may not engage in expression directed at a captive audience, or otherwise force its citizens to listen" is "central to any system of freedom of expression."). For an application of this principle specifically to the public school context, *see, e.g.*, Yudof, *supra* note 199, at 902:

> Perhaps courts should consider the degree to which the government has captured its audience in determining the likelihood of government distortion of the citizenry's thought processes. Government expression may be more persuasive when the audience has no choice but to listen to the message (or at least to appear to be doing so). Thus, the potential for government indoctrination may be greatest in the case of "total institutions" such as prisons and semitotal institutions such as schools and military bases.

eliminating the expression altogether, or by excusing particular students from listening to it.

A second reason why the minds of public school students should be especially shielded from governmental influence is that, due to their youth, the students are relatively impressionable and susceptible.[205] Consequently, to maintain the integrity of the process by which public school students form their own beliefs, it is especially important to insulate them from any potentially coercive governmental influence. Society has a significant stake in preserving the free minds of its youth, because it depends upon them to defend and maintain this country's democratic, civil libertarian institutions and traditions.[206]

An additional characteristic of the typical public school, which further enhances the importance of protecting students' freedom of belief, is its relatively authoritarian, hierarchical, and disciplined structure.[207] This structure limits the students' opportunity to express or hear viewpoints at variance with those expressed by school officials.[208] In tandem with the compulsory education requirement and the students' relative impressionability, the school's structure makes students especially vulnerable to the influence of teachers and other school authorities, who wield significant power over them.[209]

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205. *See, e.g.*, Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329, 343–44 (1963) [hereinafter cited as Choper II] (citing conclusions by social psychologists and sociologists about students' "urge to conform to their classmates' attitudes, [which] is peculiarly strong," so that for students in a religious minority, "there is a powerful, albeit subtle, pressure to conform"). As discussed *supra* notes 161, 180 and accompanying text, the Supreme Court has recognized that young people are entitled to special protection under the establishment clause because of their relative impressionability. The Court has also applied this rationale in other constitutional contexts. *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 757–58 (1978) (citations omitted):

> The Court has recognized society's right to "adopt more stringent controls on communicative materials available to youths than on those available to adults." . . . . This recognition stems in large part from the fact that "a child . . . is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." . . . . Thus, children may not be able to protect themselves from speech which, although shocking to most adults, generally may be avoided by the unwilling through the exercise of choice.

206. *See, e.g., Barnette*, 319 U.S. at 637:

> That [public schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

See also van Geel, *supra* note 191, at 261:

> [I]t would make a mockery of the protection of an adult's freedom of belief if the government could pre-condition his beliefs by indoctrinating him during childhood. Professor Feinberg calls this right not to be pre-conditioned one of the child's "rights-in-trust." These rights resemble adult rights to autonomy, but the child cannot exercise them until he is more fully formed and capable. Hence, the rights must be "saved" for the child until he is an adult, but may be violated in advance. . . . Violation of these rights during childhood assures that key options will be closed for the adult.

207. *See, e.g.*, Note, *Academic Freedom in the Public Schools: The Right to Teach*, 48 N.Y.U. L. REV. 1176, 1186 (1973) [hereinafter cited as Note]:

> Given the lack of sophistication of most children and given the basically authoritarian relationship between student and teacher, it is very likely that a child might mistake a teacher's opinions for respected and authoritative fact.

208. *See* Emerson & Haber, *supra* note 198, at 528:

> Another factor to be taken into account [in imposing limitations upon governmental speech, to protect individual freedom of belief] might be the extent to which opposing communication was available to combat the impact of the government's communication. *Thus government reports . . .* which could be offset more readily by communication through the press and other private sources, *would not be subject to as strict a standard . . . as communications emanating from the public school system.*

(Emphasis supplied).

209. *See, e.g.*, Yudof, *supra* note 199, at 874–75:

C. *No Curricular Decision Should Be Intended or Reasonably Perceived to Convey the School's Approval or Disapproval of Any Arguably Religious Belief*

For the reasons discussed in the two preceding sections, the values underlying the establishment clause, as well as other first amendment guarantees, warrant protecting public school students from the school's influence at least over any arguably religious beliefs.[210] The Supreme Court's establishment clause decisions recognize that young people in public schools are entitled to heightened protection against governmental influence over their beliefs in the religious sphere.[211] A relatively broad definition of the "religious" beliefs that the establishment clause protects in the public school setting would therefore comport with the expansive approach that already characterizes the Court's establishment clause jurisprudence in this setting.

The notion of defining religion relatively broadly, for constitutional purposes, by drawing a dichotomy between "arguably religious" and "arguably non-religious" beliefs is derived from Professor Tribe's constitutional law treatise.[212]

> In some ways public schools are a communications theorist's dream: the audience is captive and immature; the messages are labeled as educational (and not as advertising); the teacher can respond individually to the student; the audience may hold the adult communicators in high esteem; and a system of rewards and punishments is available to reinforce the messages. . . . [T]hese communications factors . . . should render courts more sympathetic to individual assertions of first amendment rights that may reduce the power of government to persuade.

See also Choper II, *supra* note 205, at 337 (establishment clause standard should be stricter in public schools than in other settings, since students are "far less mature and intellectually developed than the public generally, since they are particularly unable to evaluate conflicting religious beliefs objectively, since they are especially susceptible to being influenced in religious choice, and since they are compelled by law to attend").

210. Professor Choper has also proposed a relatively broad standard for applying the establishment clause in the "narrow but exceedingly important segment" of church-state conflicts . . . that "involve the use of the public schools to foster religion." Choper II, *supra* note 205, at 330. In this particular context, he recommended that the establishment clause should be deemed to

> prohibit[] governmental action that is likely to result in (1) a student's doing something that is forbidden by his conscientious beliefs, thus *compromising* his scruples or (2) a student's engaging in religious activities that, although not contrary to his religion's beliefs, he would not otherwise undertake, thus *influencing* his freedom of religious participation or choice.

Id. at 334 (emphasis in original).

See also Hirschoff, *Parents and the Public School Curriculum: Is There a Right to Have One's Child Excused from Objectionable Instruction?*, 50 So. Calif. L. Rev. 871, 957 (1977) [hereinafter cited as Hirschoff] (Parents should have right to have their children excused from public school instruction that conflicts with parents' values; children's potential indoctrination in values inconsistent with parents' violates first amendment's protection of freedom of speech, its implicit protection of freedom of thought, and general principle that our government requires consent of governed); Kauper, *Prayer, Public Schools and the Supreme Court*, 61 Mich. L. Rev. 1031, 1067 (1963) [hereinafter cited as Kauper] (public schools should be prohibited from "indoctrinat[ing] students in any system of beliefs and values that rest on a claim of insight into ultimate truth with respect to the meaning and purpose of life.") *See also supra* note 200.

211. The Court's broad construction of establishment clause guarantees in the public school context is already manifested by its willingness to approve judicial invalidation of public school curricular decisions to avert establishment clause violations, even though it generally does not countenance judicial invalidation of public school curricular decisions. *See supra* text accompanying notes 145–79. The same broad construction of establishment clause guarantees in the public school context is also manifested by the relatively lenient evidentiary standards pursuant to which the Court has found establishment clause violations in that context. *See supra* text accompanying notes 180–85.

212. L. Tribe, *supra* note 152, § 14–6, at 828. Professor Tribe proposes that this broad definition be used only in the context of the free exercise clause, to maximize the protection of individual conscience from direct governmental influence. *Id.* at 831. But the establishment clause is also intended to protect individual conscience from governmental influence, albeit of a more indirect nature. *See supra* note 159; *infra* note 258. Therefore, at least in the special context of public schools, where the integrity of individual conscience is at once so vulnerable and so crucial, see *supra* text accompanying notes 202–09, religion should be defined with equal breadth for establishment and free exercise purposes.

The proposed definition is intended to bring within the scope of the establishment clause, with the greater protection it affords individual freedom of conscience in the public school context, some beliefs that would otherwise receive only the diminished protection of the *Pico* standard. At least in the special public school environment, it is eminently desirable to maximize the protection afforded to individual freedom of conscience.[213] Moreover, a liberalized definition of the types of beliefs that would be protected under the establishment clause in this setting could be counterbalanced by a more exacting scrutiny of whether any such beliefs were actually threatened by a challenged curricular decision.[214] The Supreme Court's previous decisions concerning religious expression in the public schools generally involved core, traditional religious beliefs and quintessentially religious ceremonies.[215] Therefore, it is not surprising that the Court often inferred, from the mere presence of such expression in

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For further reasons why religion should not be defined more narrowly for establishment purposes than free exercise clause purposes—at least in the public school setting—*see infra* note 214; text accompanying notes 210–18.

Indeed, Courts and commentators have expressly rejected the concept of a bifurcated definition of religion in any context. *See, e.g.*, Everson v. Board of Educ., 330 U.S. 1, 32 (1947) (Rutledge, J., dissenting):

> "Religion" appears only once in the [First] Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid "an establishment" and another, much broader, for securing "the free exercise thereof." "Thereof" brings down "religion" with its entire and exact content, no more and no less, from the first into the second guaranty, so that Congress and now the states are as broadly restricted concerning the one as they are regarding the other.

See also Malnak v. Yogi, 592 F.2d 197, 211–13 (3d Cir. 1979) (Adams, J., concurring) (rejects dual definition for three reasons: plain language of religion clauses, as well as materials concerning framers' intent, support unitary definition; unitary definition would not lead to "wholesale invalidation" of government programs or "doctrinal chaos," the adverse results feared by proponents of dual definition; and dual definition would unfairly entitle some beliefs to benefits, but not burdens, of religion clauses); Choper I, *supra* note 189, at 605–06 (in addition to textual problem it poses, dual definition may not be required to avoid results feared under unitary definition); *cf.* Note, *supra* note 190, at 78 (urges adoption of "standard of uniform strictness" in establishment and free exercise cases).

But see Sheldon v. Fannin, 221 F. Supp. 766, 774–75 (D. Ariz. 1963) (establishment clause definition looks to majority's concept of religion, while free exercise clause definition looks to minority's concept); Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1686–87 n.14 (1969) [hereinafter cited as Freund] ("It may be suggested that a conventional definition of religion . . . is controlling in applying the non-establishment clause, while a heterodox version is entitled to protection under the free exercise clause, which safeguards the nonconformist conscience."); Galanter, *Religious Freedom in the United States: A Turning Point?*, 1966 WIS. L. REV. 217, 266; Harvard Note, *supra* note 188, at 1083–86 (discussing "need for a dual definition of religion for free exercise and establishment clauses, to "reduce[] the analytic tension between those clauses").

213. *See supra* text accompanying notes 202–09.

214. Professor Tribe and others who have recommended that religion be defined more broadly in the free exercise clause context than in the establishment clause context, *see supra* note 212, are concerned that defining religion relatively broadly in the latter context would jeopardize governmental actions or policies implicating beliefs that are only arguably religious. L. TRIBE, *supra* note 152, § 14–6, at 827–28, 831; Harvard Note, *supra* note 188, at 1084. These concerns are misplaced, however, so long as the courts rigorously enforce the standards for showing that a challenged policy or action actually violates the establishment clause. *See, e.g.*, Malnak v. Yogi, 592 F.2d 197, 212 (3d Cir. 1979) (Adams, J., concurring):

> The advocates of a dual definition appear to be motivated primarily by an anxiety that too extensive a definition under the establishment clause will lead to "wholesale invalidation" of government programs. Behind this fear lurks, I believe, too broad a reading of the teachings of *Seeger, Welsh* and *Torcaso*. . . . Only if the government favors a comprehensive belief system and advances its teachings does it establish a religion. It does not do so by endorsing isolated moral precepts or by enacting humanitarian economic programs.
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> . . . .
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> Moreover, the establishment clause does not forbid government activity encouraged by the supporters of even the most orthodox of religions if that activity is itself not unconsitutional.

See also Choper I, *supra* note 189, at 605 ("[C]lose examination of the operative doctrines for the religion clauses suggests that a dual definition of religion may not be required to avoid the results feared under a unitary version of the term.").

215. *See supra* text accompanying notes 146–51.

the public schools, an impermissible purpose or effect of conveying the school's approval of religion.[216] The further that a challenged practice departs from traditional religious form or substance, however, the more closely a court will have to consider evidence concerning its actual purposes or effects.

The classification of challenged curricular material or affected beliefs as arguably religious should be only the beginning of an establishment clause analysis.[217] The mere fact that curricular material has some impact upon the students' arguably religious beliefs would not justify eliminating the material from the curriculum on establishment clause grounds. The establishment clause would justify eliminating curricular material only if it was intended or reasonably perceived as conveying the school's approval or disapproval of arguably religious beliefs.[218]

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216. Exercises such as the Bible-reading at issue in *Abington*, 374 U.S. 203, or the prayer recital at issue in *Engel*, 370 U.S. 421, are plainly and exclusively religious in nature. In consequence, if the decisions to introduce such exercises into the public school curriculum had any purpose or effect, it was to endorse religious beliefs. *See* Note, *supra* note 7, at 1217:

> The degree to which a program is clearly religious will affect the strength of its impact on private choice in the same sense that the directness and prominence of a religious message will affect the strength of its influence on private choice.

The quoted Note argues specifically that the extent to which secular humanism is deemed religious should not be a litmus test for resolving establishment clause issues concerning secular humanism, but only one factor. *Id.* at 1216–17.

217. Whether secular humanism and creation science should themselves be classified as religious, or arguably religious, may in many cases not be dispositive of establishment clause challenges to their inclusion in public school curricula. For example, even if secular humanism were ruled to be not even arguably religious, fundamentalist Protestants could still contend that its teaching in the public schools inhibited their religious beliefs. Even though the theory of evolution has been held to be non-religious, *see, e.g.*, Malnak v. Yogi, 592 F.2d 197, 208–10 (3d Cir. 1979) (Adams, J., concurring) (although theory of evolution offensive to some religious groups, theory is not itself religious); Wright v. Houston Indep. School Dist., 366 F. Supp. 1208, 1211 (S.D. Tex. 1972) (theory of evolution is scientific, merely "peripheral" to religion), fundamentalist Protestants claim that the exclusive teaching of this theory—which they regard as a prime tenet of secular humanism—undermines their children's religious beliefs in creation. *See, e.g., supra* text accompanying notes 87–90 and 116. *See also* Note, *supra* note 82. Therefore, a resolution of the establishment clause claim would depend upon the impact of teaching secular humanism, which would in turn depend upon such factors as the nature of the arguably religious beliefs that were assertedly undermined by exposure to secular humanism, and the mode of instruction. A calibration of the religious content of secular humanism, considered in the abstract, would not be dispositive. *See supra* and *infra* text accompanying notes 214–18.

Establishment clause challenges to the mandatory inclusion of scientific creationism in public school curricula would also not necessarily require a definitive ruling on whether scientific creationism is itself a religious, or arguably religious, doctrine. Even assuming that creation science were a purely scientific doctrine which simply happened to coincide with certain religious beliefs, a court could still conclude that its mandatory inclusion in the curriculum had the purpose or effect of conveying governmental approval or disapproval of arguably religious beliefs. Innumerable scientific theories bear upon subjects discussed in the public schools, but are not required to be taught. *See generally* Levit, *Creationism, Evolution and the First Amendment: The Limits of Constitutionally Permissible Scientific Inquiry*, 14 J. Law & Educ. 211, 218–19 (1985) [hereinafter cited as Levit] (in other areas of public school education, not concerning theories of origins, legislatures generally prescribe only broad guidelines, leaving content of instruction to local school boards and individual teachers). Therefore, a court could fairly conclude that the reason why a state's public schools were required to add creation science to their curricula was specifically because it coincided with certain arguably religious beliefs. Under such circumstances, the court could further reasonably conclude that the purpose or effect of mandating public school instruction in creation science was to convey governmental endorsement of arguably religious beliefs, thus violating the establishment clause.

See also infra note 289 (classification of secular humanism, scientific creationism, and evolution theory as arguably religious may in many cases not be determinative of free exercise claims arising from curricular decisions concerning these matters).

218. This formulation of the establishment clause test is based upon the "clarified version" of the first two prongs of the *Lemon* test, which Justice O'Connor articulated in her *Lynch* concurrence, and which has subsequently been applied in the Court's majority opinions. *See supra* text accompanying notes 169–73. As formulated by Justice O'Connor, the test refers to perceptions without specifying that only *reasonable* perceptions should give rise to an establishment clause violation. This qualification is appropriate, though. A school should make efforts to ensure that every student understands its neutrality toward arguably religious beliefs, *see infra* text accompanying notes 255–56. However, a school's neutral

Proposed evidentiary guidelines for determining whether a curricular decision has the proscribed purpose or effect are set out in the following section.

D. *Evidentiary Guidelines for Implementing Proposed Standards*

The Supreme Court's decisions concerning religious influences in the public school—as is true of the Supreme Court's establishment clause decisions generally—consistently stress that such cases turn upon the particular facts and circumstances involved.[219] Therefore, these decisions provide relatively little guidance as to how other cases, involving similar legal claims but differing facts, should be resolved. Furthermore, these cases fail to provide specific guidance concerning the evidentiary standards that courts should invoke to ascertain whether the governing substantive law standard has been satisfied. Such evidentiary guidelines are particularly needed, however, because the controlling substantive standard—whether a governmental policy or action is intended to or does convey a message approving or disapproving religion—leaves significant latitude for judicial interpretation.

The Supreme Court's *Pico* decision also failed to provide detailed guidance for evaluating evidence under the judicial review standard it enunciated. Yet, as is true concerning the establishment clause standard, the vagueness of the *Pico* standard makes the specification of criteria for implementing it, in light of particular evidence, all the more important.[220]

Although the Supreme Court has not provided much direct guidance for implementing the standards governing public school curricular decisions in its cases prescribing those standards, some indirect guidance can be gleaned from Supreme Court decisions in related areas of constitutional adjudication. In some of these cases, the Court has explicitly addressed such evidentiary issues as the allocation and satisfaction of burdens of proof. The evidentiary principles proposed below are derived from these opinions, as well as from Supreme Court and lower court rulings regarding public school curricular decisions.

1. *No Material May Be Eliminated from the Curriculum Merely Because It Conflicts or Coincides with An Arguably Religious Belief*

It has long been settled that the first amendment's religion clauses do not protect against the mere exposure to ideas or beliefs that are offensive to or supportive of any

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curricular decision should not be invalidated merely because some students unreasonably misperceived it as reflecting the school's approval or disapproval of arguably religious beliefs. *See* Citizens Concerned For Separation of Church and State v. City and County of Denver, 526 F. Supp. 1310, 1315 (D. Colo. 1981) (court sustains nativity scene display on public property despite evidence that "its most sensitive or fastidious citizens" perceive display as conveying governmental endorsement of religion). *Cf.* Roth v. United States, 354 U.S. 476, 489 (1957) (test that "judg[es] obscenity by the effect of isolated passages upon the most susceptible persons . . . must be rejected as unconstitutionally restrictive of the freedoms of speech and press").

The proposed test omits any reference to *Lemon*'s third prong, prohibiting excessive entanglement between government and religion. For the reasons explained *supra* note 166, it seems unlikely that a public school's curricular decision would violate the entanglement test, as it is presently construed.

219. *See supra* note 10.

220. *See generally* van Geel, *supra* note 191, at 238 (The *Pico* plurality opinion's "general rules for guiding school boards and courts are so unclear as to be unworkable").

religion.[221] Even under a relatively narrow definition of religion, myriad ideas essential to scientific, political, and cultural discourse are at variance with some religious beliefs, and in harmony with others.[222] By including within the establishment clause's protection any arguably religious beliefs, the potential area of collision between the public school curriculum and protected beliefs is broadened substantially. A public school curriculum which had to eliminate any idea that collided or coincided with any arguably religious belief would contain few, if any, ideas.

2. *The Public Schools May Promote Certain Values That Are Fundamental to Our Constitutional System*

As noted above, the Supreme Court has permitted, and even encouraged, public schools to promote concepts or values that the Court has generally described as "fundamental" or "traditional," but has not specifically identified.[223] The schools may accordingly promote these values even if the result is that reasonable students perceive the school to be thereby approving or disapproving arguably religious beliefs. The difficult problem, of course, is to distinguish those values that may be inculcated, even if the school is consequently perceived to endorse or disapprove arguably religious beliefs, from those that may not be.[224]

The concepts that public schools may legitimately promote are only broad, fundamental principles or attitudes that are widely viewed as essential to our

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221. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 319–20 (1980) (fact that Congressional funding restrictions upon abortions "may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause"); McGowan v. Maryland, 366 U.S. 420, 442 (1961) (upheld "Sunday closing law," despite its adverse economic impact on business owners whose Sabbatarian religious beliefs dictated that their businesses be closed on Saturdays, because establishment clause does not bar law that "happens to coincide or harmonize with the tenets of some or all religions"); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 505 (1952) (constitutional guarantee of free speech and press prevents state from banning film on basis of censor's conclusion that it is "sacrilegious," because "state has no legitimate interest in protecting any or all religions from views distasteful to them . . . ."). *See also infra* note 288 (exposure to ideas inconsistent with arguably religious beliefs generally does not violate free exercise clause). The notion that the religion clauses do not protect against the mere exposure to ideas offensive to a religious belief was the foundation of certain rulings in the *Davis, Williams, Mozert*, and *Grove* cases, *see supra* text accompanying notes 37–38, 42, 47, 69–70.

222. *See, e.g.*, Illinois *ex. rel.* McCollum v. Board of Educ., 333 U.S. 203, 235 (1948) (Jackson, J., concurring):

> Authorities list 256 separate and substantial religious bodies . . . in the . . . United States. . . . If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds.

See also supra text accompanying notes 38, 70; *infra* note 288.

223. *See supra* text accompanying notes 131–33.

224. In addition to being authorized—and perhaps even under an obligation—to inculcate certain specific values, public schools are also under a constitutional obligation to engage generally in secular instruction to avoid violating the establishment clause. *See supra* note 66 & accompanying text; text accompanying notes 145–79. However, such neutral secular instruction is to be distinguished from a "'religion of secularism.'" *Schempp*, 374 U.S. at 225. *See id.*:

> [O]f course . . . the State may not establish a "religion of secularism" in the sense of affirmatively opposing or showing hostility to religion. . . . Nothing we have said here indicates that . . . study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.

Accord Freund, *supra* note 212, at 1685 (if public schools supported secular religion, first amendment would require their abolition); Katz, *Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426, 438 (1953)(public schools must not attempt to inculcate either religion or "secularism"—*i.e.*, philosophy that leaves no place for religion); Kauper, *supra* note 210, at 1066 ("[T]he Constitution, in establishing a secular state that cannot prescribe any official belief or creed for its citizens, whether theistic or non-theistic and whether religious or political, does not require and, indeed, does not permit government to establish secularism or secular humanism as the nation's orthodoxy").

constitutional system.[225] For purposes of resolving disputes concerning the inclusion of secular humanism or creation science in public school curricula, it is unnecessary to enumerate a definitive list of such essential principles or attitudes.[226] However, these disputes do implicate two basic attitudes, which are at least among the most important that satisfy the specified criteria: (1) a tolerance for a diversity of religious, political and other beliefs and ideas,[227] and (2) a belief that every individual should have equal rights and opportunities, regardless of such factors beyond the individual's

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225. *See, e.g.*, Emerson & Haber, *Academic Freedom of the Faculty Member as Citizen*, 28 LAW & CONTEMP. PROB. 525, 547–48 (1963) (teachers should have freedom "not simply to indoctrinate the student in the values of a narrow or local majority, but rather in the broader values that prevail in the wider and diverse community of civilized men."). *See also* Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CALIF. L. REV. 847, 848, 905 (1984) [hereinafter cited as Mansfield] (satisfactory resolution of problems under religion clauses requires articulating a "philosophy of the Constitution, regarding human nature, human destiny, and other realities," and public schools "may be vehicles for expounding the truths of this philosophy"). *See id.* at 853–54:

> [I]n certain situations, all ideological competitors of the constitutional philosophy must give way to the truths of that philosophy. . . . The posting of the [Ten] Commandments in classrooms [invalidated in Stone v. Graham] constituted an invasion of a sphere of influence reserved for the constitutional philosophy alone—the public school classroom. The case would have been no stronger for the posting of the precepts of a nonreligious ideology inconsistent with the constitutional philosophy—for example, the teachings of dialectical materialism . . . .

To say that public schools may inculcate "the constitutional philosophy" in their students does not necessarily mean that schools may block their students' exposure to competing philosophies, as Professor Mansfield indicates. To the contrary, an essential tenet of the constitutional philosophy, enshrined in the first amendment, is the individual's right of access to a diversity of ideas. In *Pico*, the Supreme Court recognized the force of this tenet specifically within the public school setting, *see supra* text accompanying notes 139–40. Even assuming that Professor Mansfield objects only to a public school's indoctrinating its students in values contrary to the constitutional philosophy—and not to a school's mere exposure of its students to those values—his dialectical materialism hypothetical would still not be persuasive. For the reasons discussed *infra*, text accompanying notes 250–56 and note 250, it should not be assumed that students' mere exposure to materials in a classroom will lead to their indoctrination. Rather, whether indoctrination is likely to occur depends on several factors, including whether the materials are the subject of any teacher commentary or student discussion.

226. *See, e.g.*, Choper I, *supra* note 189, at 612:

> [T]he challenge to first amendment theorists is development of a coherent doctrine that meaningfully distinguishes what I have loosely described as "narrow partisan ideologies" (which government may not subsidize or promote) from what may be conclusorily labeled as "widely shared and basically noncontroversial public values"—such as the inherent dignity of the individual and the essential equality of all human beings—(which the state may aid or sponsor).

See also Yudof, *supra* note 199, at 899–900 (government should be permitted to inculcate "democratic," but not "nondemocratic," values, but it would be difficult for courts to distinguish between these). It should be noted that even exposure to the "basically noncontroversial" values that Professor Choper posits would apparently violate certain arguably religious beliefs. *See, e.g., supra* notes 44 and 72 (plaintiffs in *Mozert* and *Smith* cases allege that exposure to curricular materials supporting the "essential equality of all human beings," regardless of sex, violates their religious beliefs in "God-given" sex roles).

227. *See, e.g.*, Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. 3159, 3164 (1986) ("[T]he American public school system . . . 'must inculcate the habits and manners of civility . . . as indispensable to the practice of self-government. . . . ' These fundamental values of 'habits and manners of civility, essential to a democratic society must, of course, include tolerance of divergent political and religious views . . . '"); Wisconsin v. Yoder, 406 U.S. 205, 239 (1972) (White, J., concurring) (in maintaining public schools, state seeks to "increase [students'] human understanding and tolerance"); Arons & Lawrence, *supra* note 186, at 356 n.136:

> [E]ven a system of education that fosters tolerance might expose some school children to values their own parents might reject. . . . If parents have a first amendment right to determine what values their children are taught, then the rights of intolerant parents are denied by teaching their children tolerance. Even well-meaning efforts to give equal time to different views would not dispose of the dilemma. But at least more tolerant teacher attitudes in the public schools would infringe the rights of fewer people and infringe them less severely than would intolerant propagation of any narrower official doctrine.

See also Yudof, *supra* note 199, at 886 (public schools' "educational mission" includes "promoting tolerance"). *See also supra* text accompanying notes 55–56 (*Mozert* district court approved school's use of textbooks endorsing religious tolerance).

control as race, sex, religion, or national origin.[228] These attitudes express values at the heart of our pluralistic, egalitarian political system, and have long been adhered to at least in theory, if not always in practice.[229] Public school students who have religiously based objections to either viewpoint should not be able to purge it from the public schools, any more than they could purge it from society as a whole.[230] The only possible remedy for such individuals would be to opt out of the public school curriculum—either by being excused from certain segments of it,[231] or by withdrawing from the public school altogether, and instead attending a private school.[232]

3. *Burdens of Proof*

The Supreme Court has not expressly addressed the burdens of proof that govern challenges to a school's curricular decisions on either establishment clause grounds or free speech grounds. However, in *Pico* the Court implicitly indicated that the issue of whether school officials acted with the proscribed intent should be determined

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228. *See, e.g.*, R. DWORKIN, TAKING RIGHTS SERIOUSLY 264 (1977) (society should be permitted to educate its citizens to accept author's conception of social justice); Shiffrin, *supra* note 192, at 652 ("[O]ur society has constitutionalized some basic conceptions of equality, freedom, and political democracy. It has a stake in seeing that its citizens are at least exposed to its point of view."); Yudof, *supra* note 199, at 899 (government "'propaganda' about . . . respect for minorities [should] not be treated as propaganda" that is subject to first amendment limitations). *But see* Kamenshine, *supra* note 192, at 1138 (state policy of using textbooks positively portraying blacks or women would violate first amendment, even if designed to remedy consequences arising from prior use of textbooks with adverse racial or sexual stereotypes, because "[i]t is no more permissible for government to impose as orthodoxy what most consider enlightened thinking than it is to impose currently unpopular views"). *Cf.* West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 631 (1943) (government may require public schools to instruct students in civil liberties).

229. *Cf.* Choper II, *supra* note 205, at 78 (quoting THAYER, THE ATTACK UPON THE AMERICAN SECULAR SCHOOL 210 (1951)):

> Educators and philosophers have shown that such universally accepted values as justice, property rights, respect for law and authority, and brotherhood may be derived from nonreligious sources and may be enforced by nonreligious sanctions. . . . Other generally recognized values, "in the sense that they are common to all segments of our society irrespective of religious faith or philosophic school," are "responsibility, honesty, temperance and self-control."

See also Schempp, 374 U.S. at 241–42 (Brennan, J., concurring) (emphasis in original):

> It is implicit in the history and character of American public education that the public schools serve a uniquely *public* function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influence of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions. . . . This is a heritage neither theistic nor atheistic, but simply civic and patriotic.

230. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 602–04 (1983) (it does not violate free exercise clause to deny tax exemption to educational institutions that discriminate on basis of race, even though discrimination motivated by sincere religious belief, because government has "fundamental overriding interest in eradicating racial discrimination in education."). As one commentator observed about the *Bob Jones* case:

> Evidently beliefs favoring racial discrimination are so in conflict with the truths of the constitutional philosophy, and the consequences of their implementation in educational institutions so serious from the perspective of that philosophy, that it is permissible to penalize the holding of such beliefs by the denial of tax exemption.

Mansfield, *supra* note 225, at 875.

231. The free exercise clause may require public schools to excuse students from portions of the curriculum to which they have objections grounded on arguably religious beliefs. *See infra* Part V. Exemption would be a viable remedy only if the views to which the student objected were confined to relatively small, discrete portions of the curriculum. If the values at issue are among the essential, widely shared ones that public schools are permitted to inculcate, they are more likely to pervade the curriculum, and to make exemption an unworkable option. *See generally infra* text accompanying notes 288–92 (discussing criteria for evaluating measures designed to accommodate arguably religious beliefs that are substantially burdened by exposure to material in public school curricula).

232. The free exercise clause protects a student's option of attending a private school that is compatible with his own religious beliefs, or those of his parents. *See infra* text accompanying notes 300–07.

according to the evidentiary burdens set out in *Mount Healthy County Board of Education v. Doyle*.[233]

Under the *Mount Healthy* formula, a plaintiff must establish a *prima facie* case of the defendant's proscribed intent. To do so, a plaintiff need not prove that the proscribed intent was the sole motivating factor behind the challenged act, but only that it was a motivating factor.[234] If the plaintiff makes out this *prima facie* case, the burden shifts to the defendant. To rebut a plaintiff's *prima facie* case, a defendant must prove that its action was justified by a legitimate purpose, and that even if the alleged proscribed intent were also present, it did not play a decisive role in the decision. In short, the defendant must show by a preponderance of the evidence that, absent the alleged illicit intent, it would have reached the same challenged decision.[235]

Cases concerning various areas of constitutional law, in which certain actions are deemed unlawful if undertaken for specified illicit purposes, have held that a plaintiff will prevail if it can show that a defendant's avowed permissible purpose is merely pretextual.[236] Accordingly, although *Mount Healthy* did not expressly discuss the pretext issue, a plaintiff who challenges a public school's curricular decision should be able to overcome a defendant's rebuttal by showing that the defendant's alleged legitimate purposes are merely pretexts for its actual prohibited purpose.

The Supreme Court's establishment clause decisions concerning public school curricula have not expressly addressed the allocation of evidentiary burdens in determining whether the challenged actions or policies had the purpose or effect of conveying government's approval or disapproval of arguably religious beliefs.[237] This allocation of evidentiary burdens is consistent with the allocation in *Mount Healthy*.

The allocation of burdens of proof that was explicitly applied in *Mount Healthy* (and incorporated by reference in *Pico*[238]), and implicitly applied in the Supreme Court's establishment clause cases concerning public schools, is also logical and fair in the context of establishment clause challenges to curricular decisions implicating arguably religious beliefs.[239] The ultimate burden of showing the determinative

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233. 429 U.S. 274 (1977) (where district court found that school board's decision not to renew teacher's contract was based in "substantial part" on teacher's conduct protected by free speech clause, court erred in holding teacher entitled to reinstatement without determining whether board showed by preponderance of evidence that it would have reached same decision absent protected conduct). In *Pico*, the Court quoted extensively from *Mt. Healthy*'s holdings concerning burdens of proof, and noted that "[w]ith respect to the present case, the message of th[is] precedent[ ] is clear." 457 U.S. at 870 n.22.

234. *Id.* at 287.

235. *Id.*

236. *See, e.g., Pico*, 638 F.2d 404, 418 (2d Cir. 1980), *cert. granted*, 454 U.S. 891 (1981), *aff'd*, 457 U.S. 853 (1982) (plaintiffs improperly deprived of opportunity to persuade finder of fact that defendant's ostensible justifications were actually pretext for suppression of ideas); Evans v. Buchanan, 512 F. Supp. 839, 853 (D. Del. 1981) (defendant offered legitimate reasons for its decisions, which the court concluded were not pretextual).

237. *See supra* text accompanying notes 180–85.

238. *See supra* text accompanying note 233.

239. *See generally* Keyes v. School Dist. No. 1, Denver, Colorado, 413 U.S. 189, 209 (1973) (allocation and shifting of burdens of proof depend upon considerations of sound policy and fairness); McCormick on Evidence § 337 (E. Cleary 3d ed. 1984) (allocation depends on factors including the following: (1) natural tendency to place burdens on party desiring change, (2) special policy considerations such as those disfavoring certain defenses, (3) convenience, (4) fairness, and (5) judicial estimate of probabilities). Courts have applied the *Mt. Healthy* evidentiary formula to other areas of

motivating factor behind a governmental decision, as well as the effect of the decision, is imposed upon the party most able to bear that burden—the government itself. This allocation of evidentiary burdens is also consistent with the "preferred" status of the non-establishment guarantee, as a first amendment freedom.[240] Because the government bears the burden of justifying any infringement upon first amendment rights,[241] the burden of proof is appropriately shifted to the government once a plaintiff has made a *prima facie* showing of an establishment clause violation.

For the foregoing reasons, the *Mount Healthy* evidentiary scheme should govern establishment clause challenges to curricular decisions implicating arguably religious beliefs. The plaintiff would have the initial burden of making a *prima facie* showing that the decision had a proscribed purpose or effect. If that *prima facie* case were made out, the burden would shift to the governmental decisionmakers to show, by a preponderance of the evidence, that the purpose and effect of the challenged decision were both permissible. If the governmental authorities met this evidentiary standard, the plaintiff could prevail only by showing that the alleged permissible purpose was actually a pretext.

Parties who assert establishment clause challenges to curricular decisions usually seek, by way of relief, court orders either deleting certain material from, or adding certain material to, the curriculum. No such curricular change should be judicially ordered, however, unless the court was satisfied that the proposed change would not itself violate the applicable standards. Accordingly, any parties seeking a court-ordered curricular change to rectify an alleged establishment clause violation should bear the burden of proving, by a preponderance of the evidence, that the requested change would not have any proscribed purpose or effect.[242]

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constitutional and statutory adjudication, thus reflecting its perceived soundness and fairness. *See, e.g.*, Consolidated Edison Co. v. Donovan, 673 F.2d 61, 62–63 (2d Cir. 1982) (adopted *Mt. Healthy* burden of proof rules for determining whether utility company violated Energy Reorganization Act, 42 U.S.C. § 5851, by discharging employee for "any . . . action to carry out the purposes of [the] Act or the Atomic Energy Act of 1954"); Rybicki v. State Bd. of Elections, 574 F. Supp. 1082, 1107–08 (N.D. Ill. 1982) (applied *Mt. Healthy* evidentiary analysis to claim that state legislative redistricting plan unconstitutionally diluted black voting strength); Simmat v. Manson, 554 F. Supp. 1363, 1373–74 (D. Conn. 1983) (analyzed under *Mt. Healthy* standards prisoner's claim that attempt to transfer him out of state violated his constitutional rights because motivated by prison authorities' desire to silence and punish him for expressing views critical of prison administration). In Wright Line, a Division of Wright Line, Inc., 251 NLRB 1083 (1980), *aff'd sub nom.* NLRB v. Wright Line, 662 F.2d 899 (1st Cir. 1981), the NLRB adopted the *Mt. Healthy* burden of proof formula for determining whether Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3) (1973) is violated by discharges involving some permissible motives and some impermissible ones.

240. *See, e.g.*, Thomas v. Collins, 323 U.S. 516, 529–30 (1945) (refers to "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment . . . .").

241. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 407 (1963); Martin v. Struthers, 319 U.S. 141, 144–49 (1943). *See also* P. KAUPER, RELIGION AND THE CONSTITUTION 19–21 (1964).

242. *See* Willoughby v. Stever, Civil Action No. 1574–72 (D.D.C., Aug. 25, 1972) (memorandum and order) (denying request for three-judge court), discussed *supra* note 85. Plaintiff argued that government grants for the preparation of public school biology textbooks presenting evolution theory, but not creation science, should be invalidated. The court stated that the requested relief would itself violate the establishment clause, because it "would be a proscription of a valid governmental function in deference to the religious beliefs" of plaintiff. *Id.*, slip op. at 6. *See also supra* text accompanying note 71 (Judge Canby's concurring opinion in *Grove* recognized that removing curricular materials in response to religiously-based hostility to the ideas it expresses would violate first amendment values discussed in *Pico, see supra* text accompanying notes 139–44).

4. *Types of Evidence that May Satisfy the Various Burdens of Proof*

As is true regarding the allocation of the evidentiary burdens applicable to claims of unconstitutional curricular decisions, the Supreme Court has provided little direct guidance concerning the types of evidence that would satisfy these burdens. However, with respect to the latter issue, as well as the former, some indirect guidance is provided by Supreme Court decisions in other areas of constitutional law.

In discrimination and school desegregation cases, the Court has discussed the type of evidence that will establish a *prima facie* case that a governmental policy or action has a constitutionally improper motive or purpose. For example, in *Arlington Heights v. Metropolitan Housing Corporation*,[243] the Court listed five types of evidence which may indicate that a decisionmaking body was motivated at least in part by an illicit intent or purpose: (1) evidence that the challenged decision has a proscribed effect;[244] (2) evidence that the decisionmaking body has a past history of decisions with the proscribed purpose or effect; (3) evidence concerning the sequence of events immediately preceding the challenged decision, where it can be shown that such events may well have prompted the decision; (4) evidence that the decisionmaker(s) departed from their normal procedural approach or substantive policy; and (5) the "legislative history" behind any decision, *i.e.*, contemporaneous statements by any decisionmaker(s) indicating reasons for the challenged decision.[245] Evidence of the foregoing types would also support a *prima facie* case that a curricular decision had the improper purpose of conveying the government's approval or disapproval of arguably religious beliefs.

A *prima facie* case that a curricular decision violates the establishment clause can also be based upon evidence that the decision had the proscribed effect—*i.e.*, reasonably conveying the school's approval or disapproval of arguably religious beliefs. This showing could potentially be made through the following types of evidence: testimony of individual students that they perceived the school as approving or disapproving arguably religious beliefs; opinion testimony by experts in adolescent psychology or education that, under the circumstances at issue, a reasonable student would infer school approval or disapproval of arguably religious beliefs;[246] evidence

243. 429 U.S. 252 (1977) (held that, although rezoning denial arguably had adverse impact on racial minorities, plaintiffs had not shown equal protection clause violation, because they did not prove that discriminatory purpose was motivating factor).

244. Specifically in the context of establishment clause challenges, the Court has ruled that the effect of a governmental policy or action may indicate its underlying purpose. *See, e.g.*, Stone v. Graham, 449 U.S. 39, 42 (1980); McGowan v. Maryland, 366 U.S. 420, 453 (1961).

245. 429 U.S. at 266–68.

246. For examples of establishment clause decisions that have considered such expert testimony, *see, e.g.*, Country Hills Christian Church v. Unified School Dist. No. 512, 560 F. Supp. 1207, 1216 (D. Kan. 1983) (because no actual studies supported theories, court considered psychologist's testimony speculative); Duffy v. Las Cruces Public Schools, 557 F. Supp. 1013, 1016–17 (D. N.M. 1983) (based on opinion of expert in curriculum and discipline that "children are extremely impressionable and easily influenced," court concluded that "[t]here is a clear and present danger that the children will perceive the moment of silence as government approval of religion"; because government experts "concede that there has been no meaningful research on the practical effects of the moment of silence on the educational process," court concluded these "marginal benefits" to be "clearly outweighed by the danger"); Citizens Concerned for Separation of Church and State v. City and County of Denver, 526 F. Supp. 1310, 1314–15 (D. Colo. 1981), *disagreed with by*, Lynch v. Donnelly, 462 U.S. 668 (1984) (court found evidence about effect of nativity scene display on children, which included results of study of children's reactions and expert psychological opinions, to be inconclusive).

concerning objective factors from which the court could conclude that a hypothetical "reasonable student" would infer school approval or disapproval of arguably religious beliefs;[247] and a survey of students demonstrating that some statistically significant portion perceived the school as approving or disapproving arguably religious beliefs.[248]

In evaluating an establishment clause challenge to a curricular decision including or excluding certain material, a court should consider not only the contents of the material, but also the context and manner in which it is presented to the students. For example, the contents of any single book or group of books included in the school library, standing alone, should not give rise to a *prima facie* establishment clause claim. A reasonable student should not draw any inference as to the school's approval or disapproval of any ideas or beliefs expressed in individual library books. The only reasonable inference that should be drawn from a book's mere presence on school library shelves is that the school authorities who selected or approved the book believe it to be educationally valuable.[249] The book's educational value could just as easily lie in its stimulation of a student reader's disagreement with particular ideas or beliefs it expresses, as in its stimulation of the student's acquiescence in such ideas or beliefs.[250]

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247. This would include evidence concerning both general characteristics, common to most public schools—for example, compulsory attendance requirements—and the specific characteristics of any particular school. *See, e.g.*, Trachtman v. Anker, 426 F. Supp. 198, 202 & n.3 (S.D.N.Y. 1976), *rev'd*, 563 F.2d 512 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978) (in rejecting school authorities' assertion that student-authored questionnaire concerning high school students' sexual attitudes would cause sufficient psychological harm to justify prohibiting its distribution, court relied upon following factors specific to school: it was located in New York City, where students were confronted with much information about sexuality; it taught sex education courses; and its students were intellectually gifted, and hence "likely to respond . . . with a higher degree of maturity than other students").

248. For an unusually detailed exposition of evidence supporting an establishment clause claim, *see Citizens Concerned for Separation of Church and State*, 526 F. Supp. at 1312–15. In evaluating whether a governmentally displayed nativity scene conveyed a message of government approval, the court considered expert testimony about the historic and folkloric significance of the nativity scene, expressions of reactions to the display by individuals who had viewed it, and a psychological study of the perceptions of certain Jewish children. Although acknowledging that certain individuals perceived the scene as a governmental endorsement of religion, the court concluded:

> It has not been shown that that perception is so broad or inevitable that a direct and immediate effect of advancing or inhibiting religion results. The First Amendment does not require that the prerogatives of government be limited by the sensibilities of its most sensitive or fastidious citizens.

Id. at 1315.

249. Courts may take judicial notice of "social facts" in assessing whether a governmental action or policy would be reasonably perceived as indicating approval or disapproval of arguably religious beliefs. *See supra* note 173.

250. The more complex, ambiguous, or subtle the ideas expressed in a particular book, the less reasonable any inference would be that the school endorsed such ideas. However, even the inclusion in the library of a dogmatic tract, whose express purpose is to advocate a specific ideology, should not give rise to a reasonable inference of school support. For example, if the school library contains a copy of Hitler's *Mein Kampf*, reasonable students should not thereby infer that the school endorses the anti-semitic ideas propounded in that book. To the contrary, it could reasonably be inferred that the school included this work for purposes of provoking students' rejection of its anti-semitic ideology. *See* ALA. CODE tit. 16–40–3 (1975) (instruction about communism must be given for purpose of "instilling in the minds of the students a greater appreciation of democratic processes, freedom under law, and the will to preserve that freedom"). *See also supra* text accompanying notes 67–68 (Judge Canby's concurring opinion in *Grove* stressed that mere inclusion of challenged book in school curriculum could not reasonably be construed as school's endorsement of any attitude toward religious beliefs that may have been expressed by book's authors or editors).

A prima facie case could conceivably be based upon the library's total collection, as distinguished from any individual book or group of books within it. If the entire collection reveals a consistent inclusion of books expressing approval of certain arguably religious beliefs, or disapproval of others, then a reasonable student might well perceive the school to be conveying a message approving certain beliefs and disapproving others, based simply upon the books' contents. Of course, in this situation, as in any others, a reviewing court would have to consider all relevant factors. For

For similar reasons, no *prima facie* case of impermissible purpose or effect could be based solely upon the contents of textbooks and other reading materials that are assigned in class—unless, perhaps, these reading materials are not the subject of any class presentation or discussion.[251] If, as in the usual case, assigned reading materials are the subject of teacher presentations, student reports, or other class discussion, then any such discussion must be taken into account in evaluating whether a reasonable student would perceive the school as approving or disapproving any belief to which the assigned materials refer.[252]

A factor related to the context in which curricular materials are taught, which also bears upon the purpose or effect of their inclusion in the curriculum, is the manner in which they are taught. The more closely the manner of teaching resembles indoctrination, the more likely that it violates the establishment clause. Conversely, the more closely the manner of teaching resembles unfettered analytical inquiry, the less likely that it violates the establishment clause.[253] In assessing where a school's manner of instruction should be placed on the spectrum between indoctrination and unfettered analytical inquiry, a court should first consider whether the mode of presentation is ritualistic or ceremonial. If so, a presumption would arise that students

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example, if a library contained nothing but explicitly religious books, a reviewing court should conclude that a reasonable student would perceive the school to be conveying its approval of religion. The conclusion could possibly be different, however, if the same library prominently displayed a sign stating that the school maintained a neutral position as to whether any student should adhere to any religious beliefs, and further stating that its library book collection reflected the view that well-educated persons should be familiar with the religions that have played such an important role in world history and culture.

251. In that unlikely situation, a reasonable student could possibly infer that the teacher or school approves of beliefs conveyed in the assigned reading materials, if the same beliefs are conveyed in all such materials. However, if the materials themselves express differing viewpoints and beliefs, no reasonable inference could arise that, by assigning such materials, the teacher or school endorses particular beliefs.

252. *See, e.g.*, Grove v. Mead School Dist. No. 354, 753 F.2d 1528, 1540 (9th Cir. 1985) (Canby, J., concurring), *cert. denied*, 106 S. Ct. 85 (1985):

> [O]bjectivity in education does not inhere in each individual item studied; if that were the requirement, precious little would be left to read. Instead, objectivity is to be assessed with reference to the manner in which often highly partisan, subjective material is presented, handled, and "integrated into the school curriculum . . . ."

(Quoting Stone v. Graham, 449 U.S. 39, 42 (1980) (*per curiam*)). To use an example that the Supreme Court has repeatedly invoked, if portions of the New Testament were assigned in a public school course on the history of world religions, in which Christianity was discussed neutrally along with other major religions, no reasonable student should regard the school as conveying approval of Christianity, notwithstanding that the New Testament itself indisputably endorses Christianity. *See supra* note 156.

253. *See, e.g.*, West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 631 (1943):

> [T]he State may "require teaching . . . of all in our history and . . . government, including the guarantees of civil liberty, which tend to inspire patriotism and love of country." . . . Here, however, we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it . . . means.

(Quoting Minersville School Dist. v. Gobitis, 310 U.S. 586, 604 (1940) (Stone, J., dissenting)). *Accord* L. TRIBE, *supra* note 152, § 15–5 at 901–02 ("Schools are expressly permitted, indeed even created, to promote the very same lessons in the classroom which they are prohibited from dispensing by shibboleth and coerced ceremony"). *See also supra* text accompanying note 92 (in rejecting challenge to teaching of evolutionary theory of origins unaccompanied by creation science theory, *Wright* court noted that plaintiff students did not claim they had been denied opportunity to challenge their teacher's presentations of evolution theory). *Cf.* Note, *Sex Education: The Constitutional Limits of State Compulsion*, 43 S. CALIF. L. REV. 548, 569 (1970) [hereinafter cited as Note] (establishment clause concerns that sex education program could be used to inculcate state morality code should be diminished by confining such program "to a biological description of reproductive system and factual assessment of possible costs of promiscuity. Theories of morality could be explored in the same fashion as comparative religions . . . .").

would reasonably perceive the school as approving the content of the ritual or ceremony.[254]

Factors that would be indicative of an analytical, rather than indoctrinating, mode of instruction include: any matter that is the subject of reasonable dispute is presented as opinion or theory, rather than fact or dogma; when there are competing opinions or theories regarding a particular subject, which have similar degrees of acceptance among the relevant expert communities, these competing views are presented;[255] the students are permitted—or, even better, encouraged—to ask questions about, and to express disagreement with, points made in assigned materials or in the teacher's presentations; through the assigned reading materials, the teacher's presentations, and/or class discussion, all theories or beliefs that are presented are subject to critical examination; students are permitted—or, even better, encouraged—to satisfy their class reading requirements, at least in part, by selecting materials from a range of options that present diverse viewpoints; students' grades are not dependent upon a rote regurgitation of certain theories or beliefs that are included in assigned reading materials or in a teacher's presentations, but instead upon their demonstrated understanding of, and ability to analyze, those views; and the teacher or other school authorities explain to the students that they should not interpret any course material, or any statement made by a school official, as indicating the school's approval or disapproval of any theory or belief.[256]

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254. *See, e.g., Stone*, 449 U.S. at 42 (recognizes that Ten Commandments could permissibly be integrated into curricular study of, for example, civilization, but concludes that posting Commandments on classroom wall serves no educational function, and instead "induce[s] the schoolchildren to read, meditate upon, perhaps to venerate and obey [them]"); *Schempp*, 374 U.S. at 224 (recognizes that Bible could be used to teach "nonreligious moral inspiration" or "secular subjects," but concludes that, in this case, it was used for religious purpose, because it was read aloud without comment, as part of "ceremony"); *Barnette*, 319 U.S. at 634–35, 641 (compulsory flag salute, which Court held violative of first amendment, described as "ritual," "ceremony," and "rite"). *See also* Note, *Humanistic Values in the Public School Curriculum: Problems in Defining an Appropriate "Wall of Separation"*, 61 NW. U. L. REV. 795, 811, 815 (1966) (school practice does not conflict with establishment clause if it takes form of "intellectual exercise concerning questions of ultimate moral values," but does conflict if "it partakes of . . . mystical dogmatism resembling a ceremony or ritual"; "dogmatic ritualism" should be proscribed whether it assumes form of traditional ceremony or indoctrination in humanistic creed).

255. Although public school teachers have certain first amendment rights of expression in the classroom, they have no right to proselytize their students concerning a particular viewpoint. Courts have held that any protectible interest a teacher may have in promoting a particular viewpoint in the classroom is outweighed by the state's interest in "protecting the impressionable minds of its young people from *any* form of extreme propagandism in the classroom." Parducci v. Rutland, 316 F. Supp. 352, 355 (M.D. Ala. 1970) (emphasis in original). In Knarr v. Board of School Trustees, 317 F. Supp. 832, 836 (N.D. Ind. 1970), *aff'd*, 452 F.2d 649 (7th Cir. 1971), the court upheld the school's decision not to rehire a teacher who used his classroom " 'as his personal forum to promote [various views] and to sway and influence the minds of young people without a full and proper explanation of both sides of the issue.' " Similarly, in Cooley v. Board of Educ., 327 F. Supp. 454, 457–58 (E.D. Ark. 1971), *vacated*, 453 F.2d 282 (8th Cir. 1972), the court held that a teacher could not use his classroom as a forum to speak out on civil rights when such advocacy interfered with his other duties in the classroom. *See also* James v. Board of Educ., 461 F.2d 566, 573 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972) (teacher's right to express personal views subject to some limitations because of captive aspect of classroom); Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841, 856 (classroom should not be forum for teacher or professor "to proselytize for a personal cause," due to its captive audience characteristics).

256. The courts have often ruled that such disclaimers obviate any reasonable inference that someone who is associated with the expression of certain ideas actually supports those ideas. *See, e.g.*, Pruneyard Shopping Center v. Robins, 447 U.S. 74, 87 (1980) (shopping center's owner can avoid any apparent endorsement of messages conveyed by groups exercising state constitutional right of access to center by "simply posting signs"); U.S. Southwest Africa/Namibia Trade & Cultural Council v. United States, 708 F.2d 760, 772 (D.C. Cir. 1983) (government's concern that political advertisements might be misconstrued as official pronouncements could be alleviated by printing disclaimers on advertisements).

To rebut a *prima facie* case that a curricular decision had an unconstitutional purpose or effect, a school would seek to prove essentially that the challenged decision was based upon reasonable educational policy considerations, and that the mode of instruction was calculated to advance critical inquiry, rather than to express the school's approval or disapproval of any arguably religious beliefs. If a school demonstrated that the purpose of a challenged curricular decision was to promote some educational policy, that should conclusively rebut any argument that its purpose was to convey a message approving or disapproving any religious belief (although the plaintiff could still attempt to demonstrate that the school's avowed educational policy purpose was merely pretextual). In contrast, the school's proof that it employed a non-inculcative teaching mode would not conclusively negate an inference that the challenged curricular decision had the prohibited inculcative effect. For example, even if a course on major developments in Christian theology were taught in a manner that encouraged student questions, analysis, and debate, a court could still find that it conveyed the school's approval of Christianity or disapproval of other religions. Nevertheless, evidence that any material is taught in an analytical manner, rather than an inculcative one, should weigh significantly against a finding that the primary purpose or effect of a curricular decision to include the material is to express approval or disapproval of arguably religious beliefs.[257]

Courts have advocated the use of disclaimers specifically to eliminate any reasonable inference that the government approves or disapproves of religious beliefs. *See, e.g.*, McCreary v. Stone, 739 F.2d 716, 728 (2d Cir. 1984), *aff'd mem.*, 471 U.S. 83 (establishment clause does not bar temporary location of privately owned nativity scene in public park):

> We believe that a proper disclaimer message [together with other factors] will ensure that no reasonable person will draw an inference that the Village supports any church, faith, or religion associated with the display of a creche during the Christmas season. . . . Therefore, on remand, we instruct the district court to conduct proceedings and to enter an order concerning the size, visibility and message of an appropriate disclaimer sign or signs.

See also Widmar v. Vincent, 454 U.S. 263, 274 n.14 (1981) (in holding establishment clause not violated by state university's recognition of student religious organization, Court noted that university handbook contained disclaimer disavowing university support for policies or expressions of any recognized student organization); Allen v. Morton, 495 F.2d 65, 67 (D.C. Cir. 1973) (*per curiam*) (temporary display of creche in public park would not violate establishment clause if accompanied by appropriate plaques indicating that government did not sponsor creche).

Of course, disclaimers will not always eliminate establishment clause problems. *See, e.g.*, Stone v. Graham, 449 U.S. 39 (disclaimer contained on copy of Ten Commandments required to be posted in every public school classroom, stating that they constituted basis of secular legal system, does not avert establishment clause violation).

257. The recent, ongoing spate of litigation and lobbying concerning secular humanism and scientific creationism in public school curricula may prompt schools to emphasize the analytical mode of instruction, to counter allegations that they improperly influence students' arguably religious beliefs. There are persuasive arguments that both educational policy and public policy more generally are advanced by a public school's placing greater emphasis upon its function of promoting free inquiry, rather than its function of inculcating community values. *See, e.g., Pico*, 457 U.S. at 868 (plurality opinion) ("[A]ccess to ideas . . . prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members"); Cary v. Board of Educ., 427 F. Supp. 945, 953 (D. Colo. 1977), *aff'd*, 598 F.2d 535 (10th Cir. 1979) (limiting high school students' opportunities to develop habits of free inquiry would be inequitable and unwise, since many do not go on to college); Albaum v. Carey, 283 F. Supp. 3, 10–11 (E.D.N.Y. 1968) ("[E]ven those who go on to higher education will have acquired most of their working and thinking habits in grade and high school," so they should learn how to "operate in an atmosphere of open inquiry"); van Geel, *supra* note 191, at 203, 297 (argues that courts have assigned too much weight to government's claimed interest in inculcation, and cites empirical evidence assertedly showing that government has no compelling interest in value inculcation because it does not serve governmental goals of establishing stable democracy, reducing politically inspired violence, producing loyal citizenry, or preparing students for citizenship); Note, *supra* note 207, at 1180 ("An increasingly large number of educators has come to condemn the role of the public schools as conduits for traditional dogma and community values."). Consequently, these litigation and lobbying efforts may well have a beneficial impact upon the mode of public school instruction, even if they have less impact upon the content of public school instruction.

V. Proposed Free Exercise Clause Standards for Reviewing Curricular Decisions

A. *Supreme Court Precedents Concerning Free Exercise Clause Claims Generally*

The establishment and free exercise clauses protect somewhat differing, albeit interrelated, religious freedom interests.[258] Therefore, a student or parent who challenges a public school's curricular decision involving secular humanism or creation science may be entitled to relief under one of the first amendment's religion clauses, although not under the other.

Even if a curricular decision withstands scrutiny under the establishment clause analysis discussed in the preceding part, so that it is allowed to stand for the student body as a whole, it does not follow that every student must be affected uniformly by that decision, notwithstanding objections based upon arguably religious beliefs. Under free exercise clause precedents, individual students whose arguably religious beliefs are violated by exposure to certain curricular material may be protected from such exposure. This individualized protection may be afforded even if the material does not have the purpose or effect, among the student body as a whole, of indicating that the school approves or disapproves of arguably religious beliefs.

Under the free exercise clause, the government must show that any policy or action that imposes a substantial burden[259] upon a sincerely held belief,[260] which is

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258. *See, e.g.*, Choper I, *supra* note 189, at 605–06 (emphasis in original):

> Although there is considerable overlap in the purpose and operation of the two provisions—the central function of both being to secure religious liberty—each nonetheless has an identifiable emphasis. In the main, the free exercise clause protects *adherents of religious faiths* from *secularly* motivated government action whose effect imposes burdens on them because of their particular beliefs. When the Court finds a violation of the free exercise clause, this usually means that the law is invalid as applied; all that is required is an exemption for the claimant from the law's otherwise proper operation. In contrast, the principal . . . thrust of the establishment clause concerns *religiously* motivated government action that poses a danger that *believers and nonbelievers* alike will be required to support their own religious observance or that of others. When the Court finds a violation of the establishment clause, this ordinarily means that the offensive law (or part thereof) is invalid in its entirety and may not be enforced at all.

See also L. Tribe, *supra* note 152, at § 14–2 (describing interrelationship between religion clauses); *supra* note 159 (regarding interests protected by establishment clause).

259. A governmental policy or action will be deemed to impose such a burden if it has the effect of undermining religious beliefs or inhibiting religious practices. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 715 (1977) (state statute requiring display of license plate motto that was religiously offensive to appellees violated free exercise clause because it undermined their religious beliefs). Such a burden generally results when the government either (1) forbids, or imposes an impediment upon, conduct that happens to be dictated by a religious belief, or (2) compels, or creates an incentive for, conduct that happens to be forbidden by a religious belief. If any governmental action or policy purposefully affected certain conduct adversely, specifically because it was dictated by a religious belief, that action or policy would *ipso facto* violate the free exercise clause. No compelling state interest could save any governmental measure that deliberately imposed a substantial burden upon the adherents of certain religious beliefs. *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599, 607 (1961). Any such measure would also plainly violate the establishment clause, under the purpose prong of the *Lemon* test, *see supra* text accompanying note 164.

260. Courts generally do not closely scrutinize the sincerity with which a religious belief is held, because to do so could itself undermine religious freedom concerns. *See generally* Thomas v. Review Board, 450 U.S. 707, 714 (1981) ("[R]eligious beliefs need not be acceptable, logical, consistent or comprehensible to others in order to merit First Amendment protection); Choper I, *supra* note 189, at 580 ("[T]he very idea of a legal definition of religion may be viewed as an establishment of religion in violation of the first amendment. . . . [A]pplication of the definition should avoid intrusive examinations into the private realms of thought and behavior of claimants as much as possible"); *cf.* United States v. Ballard, 322 U.S. 78, 87 (1944) (free exercise clause may be violated by submitting to jury questions concerning truth or falsity of defendant's religious beliefs or doctrines).

central[261] to a *bona fide* religion,[262] constitutes the least restrictive means of substantially achieving a compelling end.[263] Even when a governmental action or policy is necessary for substantially achieving a compelling purpose, it still might not be enforceable against individuals whose sincerely held, centrally important, arguably religious beliefs dictate noncompliance. The government may be required to pursue a policy of accommodation, tailoring programs or policies so they will not have the effect of coercing individuals to take actions that conflict with such beliefs.[264]

The requirement that the government reasonably accommodate sincere religious beliefs is illustrated by the Supreme Court's decision in *Sherbert v. Verner*.[265] In this leading free exercise case, the Court held that a state unemployment compensation program was required to exempt a Seventh Day Adventist from the general rule that no benefits would be paid to any unemployed person who declined to accept "suitable work when offered."[266] Because the claimant's sincere, centrally important religious beliefs forbade her from working on Saturdays, she had declined offered work that was suitable in other respects. The Court reasoned that the state policy substantially burdened the claimant's free exercise of her religion, since it forced her to choose between receiving unemployment benefits and following her sabbatarian religious beliefs.[267] Accordingly, the Court had to consider whether this policy was justified by a compelling state interest, which could not be substantially achieved by means that placed less of a burden upon the claimant's beliefs. The Court treated the state's asserted objective, which was to assure that unemployment compensation would be paid only to individuals who were involuntarily unemployed, as compelling. However, the Court held, the state had not shown that permitting sabbatarians

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261. *See, e.g.*, Romney v. United States, 136 U.S. 1, 49–50 (1890) (in upholding law prohibiting polygamy against Mormons' free exercise claims, Court stressed that polygamy was not central to Mormon faith); People v. Woody, 61 Cal. 2d 716, 720–22, 725, 394 P.2d 813, 816–18, 820, 40 Cal. Rptr. 69, 72–74, 76 (1964) (en banc) (in holding unconstitutional application of state criminal statutes to Navahos using peyote in religious ceremony, court said "peyote . . . is the *sine qua non* of defendants' faith."). *See generally* L. TRIBE, *supra* note 152, § 14–11 at pp. 862–65. *See also infra* note 325.

262. This concept has been construed with increasing liberality. *See supra* note 188. The present Article maintains that, at least in the public school context, the free exercise clause should protect any arguably religious belief. *See infra* note 274.

263. *See* L. TRIBE, *supra* note 152, § 14–10.

264. The Supreme Court has not enunciated precise criteria for determining when the free exercise clause requires the implementation of accommodation measures. Any holding that the government must take special steps to protect religious beliefs creates potential problems under the establishment clause. *See infra* text accompanying note 290. *See also* Buchanan, *Accommodation of Religion in the Public Schools: A Plea for Careful Balancing of Competing Constitutional Values*, 28 UCLA L. REV. 1000, 1013 (1981) [hereinafter cited as Buchanan]:

> Because of the tension between the free exercise and establishment clauses, the Court has been cautious in defining the areas in which government must accommodate religious belief and practice. . . . In a wide range of fact situations, the Court will permit government to avoid accommodation in the interest of preserving establishment clause values and achieving legitimate secular goals.

Even if the free exercise clause does not require the government to accommodate religious beliefs, it may in some situations still do so without violating the establishment clause. *See infra* note 291. *See generally* L. TRIBE, *supra* note 152, § 14–4, at 821–23, § 14–10, 852–53.

265. 374 U.S. 398 (1963).

266. *Id.* at 401.

267. *Id.* at 404.

to decline jobs requiring Saturday work would prevent the state from substantially achieving this objective.[268]

B. *The* Yoder *Case*

Wisconsin v. Yoder[269] is another leading free exercise case, which illustrates the application of free exercise principles specifically in the context of the public school curriculum. It therefore constitutes an especially important precedent for free exercise challenges to public school curricular decisions involving secular humanism or scientific creationism.

Yoder held that Amish parents and children must be exempted from Wisconsin's compulsory school attendance laws, which required all children to attend school until age sixteen, on the basis of their religious beliefs. As the state conceded, members of the Amish religious community have sincere, centrally important religious beliefs that their children should not attend any school, whether public or private, beyond the eighth grade. Amish parents believe that sending their children to high school would endanger their children's religious salvation, as well as their own, because higher learning tends to develop values that alienate man from God. This view is simply one manifestation of the core Amish tenet that salvation requires life in a church community separate and apart from worldly influence.[270]

The *Yoder* opinion recognized that states have compelling interests in educating their children. The Court declared that the state has "a high responsibility for education of its citizens," and that "[p]roviding public school is at the very apex of the function of the state."[271] However, the Court used equally strong language to describe the protection accorded free exercise claims, stressing the high burden of proof that a state must meet to overcome such a claim:

> The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.[272]

Accordingly, the Court observed that "a state's interest in universal education, however highly we rank it, is nevertheless subject to 'a balancing process when it impinges on' free exercise rights."[273]

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268. *Id.* at 407–09. *Compare* United States v. Lee, 455 U.S. 252, 259 (1982) (free exercise clause did not mandate exemption from payment of Social Security taxes, notwithstanding sincere religious belief prohibiting such payment, because exemption would "unduly interfere with fulfillment of the governmental interest" in maintaining Social Security system).

269. 406 U.S. 205 (1972).

270. The Court noted that high schools "tend [] to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students." 406 U.S. at 211. Just as these values are inconsistent with sincere central beliefs of the Amish, so too they are apparently inconsistent with sincere, central beliefs of certain fundamentalist Protestants, who share the Amish conviction that salvation requires "separation from, rather than integration with, contemporary worldly society." *Id. See* Note, *supra* note 82, at 524–25 (many Protestant religions require their adherents to maintain some "separation" from teachings or practices that conflict with their tenets, although only a few require "absolute" separation, "forbid[ding] any exposure to contrary belief").

271. 406 U.S. at 213.

272. *Id.* at 215.

273. *Id.* at 214.

In applying the prescribed balancing analysis to the facts at issue in *Yoder*, the Court first examined whether the Amish opposition to high school attendance was in fact dictated by sincere religious beliefs, as opposed to merely secular convictions. Stressing the long-established, highly organized nature of the Amish faith, as well as its pervasive influence over its adherents' lives, the Court concluded that the Amish desire to shield their children from exposure to secular values in high schools was dictated by "deep religious conviction."[274]

Having determined that the state's compulsory education requirement conflicted with Amish religious beliefs, *Yoder* next analyzed the state's asserted justification for this requirement: that education is necessary to prepare citizens to participate effectively in our political system, and that education prepares individuals to be self-sufficient participants in society. The Court concluded that one or two years of compulsory education beyond the eighth grade were not necessary to prepare the Amish children for life in their separated, agrarian communities.[275] The Court further found that even Amish children who might choose to leave those separate communities would be unlikely to "become burdens on society because of educational shortcomings."[276] Accordingly, the Court concluded that the state had failed to show with the necessary "particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish."[277]

The Supreme Court ruling in *Yoder* was firmly anchored to the special situation presented by the Amish faith. The Court emphasized the long history of the Amish sect and the uniquely close interrelationship between the Amish beliefs and way of life. It expressly observed that "probably few other religious groups or sects" could make the showing necessary to mandate exemption from state compulsory education requirements.[278] Therefore, notwithstanding *Yoder*'s holding concerning the partic-

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274. *Id.* at 216. The Court said that the free exercise claim would have to be rejected if the Amish were opposed to contemporary secular values for non-religious reasons. Citing Henry David Thoreau's rejection of the social values of his time, and his resulting self-imposed isolation at Walden Pond, the Court said that "Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses." *Id.*

This portion of *Yoder* seems to support a relatively narrow definition of religion, and appears to be inconsistent with the broader concept that the Court had recognized in *Welsh* and *Seeger*, discussed *supra* note 188. In his separate opinion in *Yoder*, Justice Douglas criticized the Court's apparent retrenchment from *Welsh* and *Seeger*. 406 U.S. at 248–49 (Douglas, J., dissenting in part). In these two previous decisions, the Court had eschewed the very type of dichotomy between religious and philosophical convictions that it apparently endorsed in *Yoder*.

For the reasons discussed *supra*, text accompanying notes 186–209, religion should be defined relatively broadly in the public school context for establishment clause purposes. For the same reasons, religion in the public school context should also be defined relatively broadly for free exercise clause purposes. Indeed, some courts and scholars have advocated that religion be defined more expansively for free exercise clause purposes than for establishment clause purposes. *See supra* note 212. Although other courts and scholars have urged that religion be given a single definition in both contexts, *see supra* note 212, the author is aware of none advocating a narrower definition in the free exercise context than in the establishment context. Consequently, courts reviewing curricular decisions under the free exercise clause, as well as under the establishment clause, should protect beliefs that are arguably religious, and not just those that are clearly religious. *See* L. TRIBE, *supra* note 152, § 14–6, at 828–29 (in free exercise clause context, religion should encompass everything that is at least arguably religious); Harvard Note, *supra* note 188, at 1089 (in free exercise clause context, religion should embrace anything of "ultimate concern" for individual).

275. 406 U.S. at 221–22.

276. *Id.* at 224.

277. *Id.* at 236.

278. *Id.* In the same vein, the Court stated:

It cannot be overemphasized that we are not dealing with a way of life and mode of education by a group

ular facts presented, its dicta stress the general principle that courts should usually not grant exemption from, or otherwise interfere with, any public school curricular decisions, even in response to free exercise claims:

> Our disposition of this case . . . in no way alters our recognition of the obvious fact that courts are not school boards or legislatures, and are ill-equipped to determine the "necessity" of discrete aspects of a State's program of compulsory education. This should suggest that courts must move with great circumspection in performing the sensitive and delicate task of weighing a State's legitimate social concern when faced with religious claims for exemption from generally applicable educational requirements.[279]

C. *Proposed Evidentiary Guidelines for Resolving Free Exercise Challenges to Public School Curricula*

With respect to the burden of proof the government must bear to overcome a free exercise claim, there is some inconsistency between *Sherbert* and *Yoder*, and even within *Yoder* itself. *Sherbert*,[280] as well as some language in *Yoder*,[281] indicates that the government has the heavy burden of demonstrating the specific necessity of any challenged program or policy. Furthermore, *Sherbert*,[282] as well as some language in *Yoder*,[283] indicates that the government has the additional burden of demonstrating the necessity of not exempting individuals who object on religious grounds. In contrast, other language in *Yoder*[284] suggests that, at least in the context of a challenge to a public school curricular decision, the challenger should bear the burden of demonstrating that his participation in that aspect is not necessary.

The Court's ambivalence about burdens of proof governing free exercise challenges to public school curricular decisions reflects the tension between the Court's usual strict scrutiny of governmental decisions challenged on free exercise grounds, and its usual deference to governmental decisions involving public education. Under free exercise precedents generally,[285] as with any strict scrutiny

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claiming to have recently discovered some "progressive" or more enlightened process for rearing children for modern life.

Id. at 235.

279. *Id.* at 234–35.

280. *See* 374 U.S. at 407–09.

281. *See* 406 U.S. at 214–15.

282. *See* 374 U.S. at 407–09.

283. *See* 406 U.S. at 236.

284. *See supra* text accompanying note 279.

285. *See supra* text accompanying notes 259–68. This strict scrutiny standard for reviewing free exercise claims apparently survives the Supreme Court's recent decision in Bowen v. Roy, 106 S. Ct. 2147 (1986) at least with respect to claims concerning public school curricular decisions. Five Justices voted to overturn an injunction that prohibited welfare authorities from denying benefits to appellees who refused to comply with statutory requirements that they furnish Social Security numbers for their household members. Appellees contended that obtaining a Social Security number for their daughter would violate their Native American religious beliefs. Two Justices voted to overturn the district court's injunction on jurisdictional grounds. *See* 106 S. Ct. at 2158 (Blackmun, J., concurring in part); *id.* at 2160 (Stevens, J., concurring in part and concurring in the result).

The three remaining Justices who voted to overturn the injunction ruled that the district court had imposed too strict a standard in requiring the government to justify not exempting appellees from the challenged requirement as the least restrictive means of accomplishing a compelling state interest. Instead, Chief Justice Burger, joined by Justices Powell and Rehnquist, enunciated the following less stringent test for evaluating any governmental program or policy that imposes indirect burdens upon free exercise:

> Absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the

analysis,[286] a court will overturn a challenged governmental decision, once a plaintiff has demonstrated a *prima facie* claim, unless the government can show that the decision promotes a compelling interest and that there are no less restrictive alternatives for promoting such interest. In contrast, under precedents concerning judicial review of educational decisions, a court will not even review a challenged decision unless the plaintiff has shown that it "directly and sharply implicate[s] basic constitutional values."[287]

The fair resolution of free exercise claims involving public school curricular decisions should employ an intermediate evidentiary approach, which charts a middle course between strict scrutiny and deference. Any student asserting a free exercise challenge to a public school curricular decision, and proposing an accommodation measure to remedy the alleged violation, would bear the initial burden of making *prima facie* showings that: (1) the challenged decision imposes a significant burden upon an arguably religious belief, which is both sincerely held and centrally important;[288] (2) any compelling interest that is promoted by the curricular decision could be substantially achieved even if the proposed accommodation remedy is granted; and (3) the proposed accommodation remedy is no more extensive than necessary to eliminate any free exercise violation, would not cause significant inconvenience, and would not for any other reason violate the establishment clause.[289]

Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest.

Id. at 2156 (Burger, C.J.).

Five Justices apparently rejected this less stringent test, however. *See id.* at 2160 (Blackmun, J., concurring in part) (dicta) (*Sherbert* and *Yoder* would dictate affirmance of injunction); *id.* at 2166 (O'Connor, J., concurring in part and dissenting in part, joined by Brennan and Marshall, JJ.) (contrary to test set out in Chief Justice's opinion, precedents hold that "Government must accommodate a legitimate free exercise claim unless pursuing an especially important interest by narrowly tailored means"); *id.* at 2169 (White, J., dissenting) (*Sherbert* controls).

Even if a majority of the Court were willing to adopt Chief Justice Burger's relaxed test for evaluating indirect burdens upon free exercise, that test still would not govern challenges to the inclusion of secular humanism or scientific creationism in public school curricula, since those challenges concern direct burdens upon free exercise rights. Due to the compulsory nature of school attendance, students are forced to study any secular humanism or scientific creationism that is included in the curriculum, even if it conflicts with their sincerely held religious beliefs. They are not merely faced with what the Chief Justice's opinion characterized as an indirect burden, subject to less strict scrutiny: having to choose between receiving a government benefit and adhering to their religious beliefs. *See id.* at 2149–56. Consequently, even under the Chief Justice's formulation, any free exercise claim arising from mandatory elements of a public school curriculum would be subject to the strict scrutiny of *Sherbert* and *Yoder*.

286. *See generally* L. TRIBE, *supra* note 152, § 16-6, at 1001–02.

287. Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

288. Generally, the mere exposure to theories or beliefs that are inconsistent with arguably religious beliefs would not violate the free exercise clause, any more than such exposure would ipso facto violate the establishment clause, *see supra* text accompanying notes 38, 70; note 221. To make out a prima facie case that such exposure imposed a substantial burden, a litigant would have to demonstrate an arguably religious belief (which is sincerely held and centrally important) specifically in a duty to remain insulated from conflicting views. Some religious faiths apparently adhere to this doctrine of "absolute separation." *See supra* note 270 & accompanying text. However, individuals who do not espouse a separatist creed could not show this first element of a prima facie free exercise claim unless they demonstrated a greater burden upon their religious tenets than mere exposure to inconsistent ideas or beliefs.

289. Just as the classification of secular humanism, scientific creationism, or evolution theory as arguably religious should in many cases not determine an establishment clause claim to its inclusion in a public school curriculum, *see supra* note 217, so too these classification issues should in many cases not determine free exercise claims. Even if secular humanism is not itself arguably religious, the forced exposure to it could still substantially burden the sincerely held, centrally important, arguably religious beliefs of certain students. Similarly, even if evolution theory is not itself arguably

The first two showings are the basic elements of a free exercise violation. The third showing is necessary to ensure that any proposed accommodation measure would not violate the establishment clause. As the Supreme Court has recognized, there is always a "danger than an exemption from a general obligation of citizenship on religious grounds may run afoul of the establishment clause" by creating reasonable perceptions that the government approves religion.[290] Therefore, no accommodation measure should be approved unless its proponents can make a *prima facie* showing (which its opponents cannot rebut) that the establishment clause danger would not in fact materialize.

The requirement that any proposed accommodation measure be no more extensive than necessary to eliminate the alleged free exercise violation reflects establishment clause concerns. The only justification for giving special treatment to individuals with certain arguably religious beliefs is the necessity of protecting their free exercise rights. Any additional measures, beyond those necessary to protect free exercise rights, would at least create a danger of crossing the boundary between permissible accommodation of religion and impermissible promotion of it.[291] Establishment clause concerns also dictate the requirement that an accommodation measure not cause significant inconvenience.[292]

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religious, the forced exposure to it, unaccompanied by instruction in creation science, could still substantially burden the sincerely held, centrally important, arguably religious beliefs of some students.

290. *Yoder*, 406 U.S. at 220–21.

291. The Supreme Court has held that the establishment clause is not necessarily violated by a greater degree of accommodation than that required by the free exercise clause. Walz v. Tax Comm'n, 397 U.S. 664, 673 (1970) ("The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause"). Professor Tribe proposes that a measure accommodating religious beliefs should pass muster under the establishment clause so long as it is "arguably (even if not beyond doubt) compelled by the free exercise clause . . . ." L. TRIBE, *supra* note 152, § 14–4, at 822. This suggestion is consistent with Professor Tribe's view that "the free exercise principle should be dominant in any conflict with the anti-establishment principle." *Id.* § 14–7 at 833. It is also consistent with his proposal that, for free exercise clause purposes, "religion" should be defined relatively broadly as including "all that is 'arguably religious,'" whereas, for establishment clause purposes, "religion" should be defined relatively narrowly as excluding "anything 'arguably non-religious.'" *Id.* § 14–6 at 828.

For a contrasting standard of permissible accommodation specifically in the public school setting, which would give greater weight to establishment clause considerations than Professor Tribe's proposed standard, *see* Buchanan, *supra* note 264, at 1031–46 (in each case, competing establishment and free exercise concerns should be weighed, considering, among other things, the following factors: the extent to which accommodation would disrupt the school's secular educational function, in terms of both pervasiveness and frequency of occurrence; the extent to which the accommodation arrangement constrains the freedom of choice of non-accommodated students, by creating direct or subtle pressures to participate in the measure; the financial cost of the accommodation to the government; whether the government has encouraged or initiated students' participation in the accommodation arrangement, as distinguished from acceding to a student- or parent-initiated proposal; whether the school has remained ideologically neutral, as between religious expression and other constitutionally protected expression; and the students' age). *See also* Dorsen & Sims, *The Nativity Scene Case: An Error of Judgment*, 4 U. ILL. L. REV. 837, 862–63 (1985):

> Two factors ordinarily determine whether government involvement with religion is a permissible accommodation of free exercise. The first is whether the state is genuinely removing obstacles to free exercise . . . or whether the state is merely supplementing opportunities which already exist. . . . The second factor is whether the state facilitates free exercise merely by providing services secular and neutral in themselves . . . or whether the state becomes directly involved in religious activity . . . .

292. Any measure that entailed substantial inconvenience would have the primary purpose or effect not of accommodating religious beliefs, but rather of promoting them. Reasonable students would perceive any such measure—for example, one that imposed significant financial or administrative costs upon the school—as conveying the school's approval of religion. One factor determining whether any accommodation measure would entail significant inconvenience is the number of students participating in it. The larger the number, the greater the degree of disruption to the school's normal functions would probably be, and the more likely that a reasonable, non-objecting student would perceive the school as approving the arguably religious beliefs of the students involved in the accommodation arrangement. For an

If a student makes out a *prima facie* case of a free exercise violation and entitlement to a specified accommodation measure, the burden of proof would shift to the school authorities. The student's claim would prevail unless they could demonstrate, by a preponderance of the evidence, one or more of the following: (1) no arguably religious belief—which was both sincerely held by, and of central importance to, the student—was substantially burdened by the challenged curricular decision; or (2) the school has a compelling interest that could not be substantially achieved if the student's proposed accommodation remedy were granted; or (3) the proposed accommodation remedy would violate the establishment clause for any reason, including because it is more extensive than necessary to eliminate any free exercise violation, or would cause significant inconvenience.

D. *Appropriate Accommodation Measures to Cure Free Exercise Violations Caused by Public School Curricula*

The type of accommodation remedy generally sought by someone with a religious objection to a governmental program or policy is an exemption from the program or policy. In some cases, alternative types of accommodation measures might be appropriate, if they satisfied the criteria specified in the preceding section. In the context of a free exercise challenge to a public school curricular decision, the most obvious accommodation measure would be the exemption of the religiously objecting student from the impact of the decision.[293] Other appropriate accommoda-

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example of a case rejecting a proposed accommodation measure in part because of the attendant inconvenience, stemming from the large numbers of participating students, *see* Davis v. Page, 385 F. Supp. 395, 397–402 (D.N.H. 1974) (denied request of Apostolic Lutheran school children to be excused from classroom each time audio-visual equipment used, based upon their belief that it is sinful to watch or listen to such devices, where 20% of school's students are Apostolic Lutherans and this equipment is used in "practically every course," *id.* at 401). Another aspect of this case is discussed *supra*, text accompanying notes 32–38.

293. It has been suggested that exemption may not be an adequate remedy for students whose arguably religious beliefs are undermined by elements of the public school curriculum, because these students may feel pressure to forego the exemption to avoid any stigmatization that they fear might accompany it. *See, e.g.*, Hitchcock, *supra* note 16, at 16. Consequently, it is urged, the appropriate accommodation measure is either the elimination of the challenged curricular elements or the "neutralization" of those elements by giving "balanced treatment" or "equal time" to views compatible with the arguably religious beliefs in question. *See, e.g.*, Note, *supra* note 82, at 545–70.

That an accommodation measure may not completely eliminate any burden on an arguably religious belief does not necessarily obligate the government to pursue a greater degree of accommodation. *See supra* note 264. The Supreme Court has consistently held that the free exercise clause, in contrast with the establishment clause, does not protect against indirect coercion or pressure upon religious beliefs. *See, e.g., Schempp*, 374 U.S. at 233; *see also* passage from *Engel*, 370 U.S. at 430–31, quoted *supra* note 159. Moreover, the revision of a school curriculum that comports with establishment clause principles, in order to accommodate the arguably religious beliefs of some students, would itself raise serious establishment clause concerns. *See infra* text accompanying notes 297–99. *See also* text accompanying note 353 (regarding superiority of exemption, versus balanced treatment, as remedy for any free exercise clause violation caused by exclusive teaching of evolution theory).

Students who are not entitled to an accommodation measure that would eliminate all indirect pressure upon their arguably religious beliefs in the public school environment (or for whom no such measure is available, because of countervailing establishment clause concerns) may have to choose between coping with the indirect pressure or instead attending a private sectarian school compatible with their beliefs, *see infra* text accompanying notes 300–07. *Cf.* Recent Developments, *The Constitutionality Under the Religion Clauses of the First Amendment of Compulsory Sex Education in Public Schools*, 68 MICH. L. REV. 1050, 1056–57 (1970) (rejects argument that exempting students with religious objections to public school sex education courses does not satisfy free exercise requirement, and that courses should instead be eliminated, based upon alleged indirect pressures to attend; explains that "the concept of social pressure to conform as inhibiting an election to be exempted has no relevance to a case arising under the free exercise clause").

tion measures might include the following: the student could be given an alternative assignment;[294] the student could be granted "release" time to leave the school premises for alternative instruction elsewhere—for example, a religious institution;[295] the school could use disclaimers and other measures to diminish any decision's adverse impact upon the student's arguably religious beliefs.[296]

Some parents and students who assert free exercise challenges to public school curricular material concerning secular humanism or evolution theory have advocated two additional accommodation measures: (1) deleting from the curriculum any materials that convey secular humanism or evolution theory;[297] or (2) "neutralizing" the effect of the challenged materials by adding to the curriculum other materials that convey contrasting viewpoints or theories.[298] However, neither of these accommo-

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The values underlying the first amendment may even be promoted by public school students' experience with indirect pressures upon minority religious beliefs. *See* Hirschoff, *supra* note 210, at 919–20:

> [T]he school will not be able to prevent all ostracism and . . . even in the absence of taunts by other children, an excused child may feel "left out." It is equally possible, however, that a child may suffer psychological harm from being instructed contrary to his parents' strongly held values. . . . A child whose parents are able to instill in him values which run counter to the values of the majority will eventually have to learn to cope with his "deviance." It is reasonable to allow him to learn in school how to do so. Not only may his classmates learn to tolerate dissent if . . . the school respects his differences, but the child may be better able . . . to withstand peer pressures to change.

294. Any alternative instructional materials would have to comply with applicable state educational requirements. They would also have to be used in such a way that the school would not be significantly burdened. For example, the school should not have to bear the inconvenience or expense of administering separate classes or examinations. The state's educational requirements, as well as the school's interest in minimizing inconvenience, might be satisfied if the students' demonstrated their mastery of the alternative materials without specially designed tests. For example, the students could be required to pass a standardized achievement or comprehension test in the relevant subject area. Alternatively, the students might be required to write essays concerning the subject area.

295. *See supra* note 146 and accompanying text.

296. The present Article also included the use of disclaimers or explanatory statements among the recommended steps for promoting the school's function as a marketplace of ideas, and thereby minimizing potential establishment clause problems caused by public school curricular decisions. *See supra* note 256 and accompanying text. Similarly, the other steps that a school could take to promote the analytical mode of instruction, *see supra* text accompanying notes 253–56, would minimize free exercise problems, as well as establishment problems. The more clearly a school's instructional mode indicates that a particular belief or theory is not being espoused as absolutely true, but rather is being presented for critical examination and analysis, the less likely that a student's exposure to that belief or theory would violate a sincerely held religious belief. The adherents of relatively few religions believe that they have a religious duty to avoid even being exposed to ideas or beliefs that conflict with their own tenets, *see supra* note 270. Surely even fewer would believe in a religious duty to avoid exposure to beliefs that are expressly presented for consideration only, and not in a dogmatic or inculcative fashion. *See* Segraves v. State of California, No. 278978 (Super. Ct. Sacramento County, March 6, 1981) at 5, 6–9 (transcript of oral decision) (court found that statewide distribution of earlier school board statement, which urged textbooks to avoid "dogmatism" in discussing theories of origins, would sufficiently accommodate plaintiffs' creationist religious beliefs).

297. This type of relief was sought in every case challenging secular humanism in public school curricula that has resulted in a reported decision. *See supra* text accompanying notes 40–42, 45, 63; notes 72 and 79. As discussed *supra* note 291, Professor Tribe contends that accommodation measures should not be held violative of the establishment clause so long as they are arguably compelled by free exercise considerations. Nevertheless, he concludes that the exclusion of evolution theory from public school curricula would violate even this relatively lenient establishment clause standard:

> [A]lthough it is at least arguable that the free exercise clause requires some accommodation in public schools to the views of persons religiously opposed to teaching or learning about the theory of evolution, no plausible argument could be advanced to the effect that the clause mandates the total exclusion of that theory from the public school curriculum; such exclusion therefore goes too far.

L. TRIBE, *supra* note 152, § 14–4, at 822–23. *Cf.* Note, *supra* note 253, at 564 (enjoining sex education for all public school students, to protect religious ideas of some, would violate establishment clause).

298. This accommodation strategy is incorporated in the statutes requiring public schools that teach evolution also to teach creation science, *see supra* text accompanying notes 104–05 and 118. Such a neutral or balanced treatment approach is analogous to the "fairness doctrine" administered by the Federal Communications Commission, which

dation measures would pass muster under the establishment clause. By definition, the curricular materials at issue can withstand establishment clause scrutiny, or else they would have been deleted with respect to all students. Therefore, students asserting a free exercise violation may claim only that exposure to these materials infringes their rights as individuals; they may not claim that such exposure infringes the rights of the school's student body more generally. However, insulating all students from the impact of curricular materials, by either removing the materials or adding other materials, would be a remedy substantially broader than the free exercise problem it is allegedly designed to solve. The purpose and effect of such broad curricular reform measures are not confined to protecting the free exercise rights of the objecting students. Rather, in purpose and effect, these measures go further, and convey the message that the school approves the arguably religious beliefs of the objecting students. In contrast with both proposed "accommodation" measures, which would directly affect all students, no accommodation measure that the Supreme Court has approved has directly affected individuals other than those asserting free exercise claims.[299]

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generally requires broadcasters to afford "reasonable opportunity for the presentation of contrasting viewpoints on controversial issues of public importance." *Federal Register*, 1046, July 1, 1964.

Some commentators have expressly urged that the entire public school curriculum should be subject to a balanced treatment requirement similar to the fairness doctrine. *See, e.g.*, Emerson & Haber, *supra* note 198, at 526–28 (because access to education is largely dependent upon governmental institutions for support, the situation is analogous to broadcasting, where physical limitations on number of wavelengths require government control over right to broadcast; in public schools, government should have obligation to present fairly balanced exposition of relevant theories and viewpoints, and of alternatives for action); van Geel, *supra* note 191, at 290, 297 ("fairness principle," derived from first amendment, requires that public school curriculum adequately and objectively present major opposing views concerning political and moral issues, when it presents such issues at all); Yudof, *supra* note 199, at 884–88 (public schools should be viewed as semi-public forums, to which outsiders should be allowed broad access rights, to counter state monopoly over communication and expose students to diverse information and ideas); Note, *Challenging Ideological Exclusion of Curriculum Material: Rights of Students and Parents*, 14 HARV. C.R.—C.L. L. REV. 485, 508–13 (1979) (broadcasting model should be applied to public school, requiring school to include in curriculum fair sampling of divergent perspectives within community). *See also* Kamenshine, *supra* note 192, at 1115, 1134 (government should be prohibited from advocating viewpoint regarding any issue of public importance in any context, including public schools). *But see* Arons & Lawrence, *supra* note 186, at 317 (teaching is never value-neutral, because school has "hidden curriculum," including role models provided by teachers, structure of classrooms and student-teacher relationships, and ways in which attitudes and behavior are rewarded and punished; "[i]t is unlikely that any amount of 'equal time' for other points of view will reduce" inculcative effect of this "hidden curriculum").

Imposing a general balanced treatment requirement, applicable to the entire public school curriculum, would obviate the establishment clause problems that would result from imposing such a requirement solely as to subjects with religious implications, *see supra* note 217. However, such a requirement would raise other problems. A detailed examination of the proposals to implement a fairness doctrine in public school curricula is beyond the scope of this Article. Suffice it to note that such a step could have the following adverse effects: increasing judicial intervention in the public schools; limiting the academic freedom of teachers and school administrators; and reducing the analytical mode of instruction by deterring teachers from presenting material sufficiently important or controversial to trigger the balance requirement. Some scholars who have studied the operation of the fairness doctrine in the broadcast media context have concluded that it retards discussion of important or controversial subjects, rather than stimulating such discussion, which was one of the doctrine's intended effects. *See, e.g.*, F. FRIENDLY, THE GOOD GUYS, THE BAD GUYS AND THE FIRST AMENDMENT: FREE SPEECH VS. FAIRNESS IN BROADCASTING 221 (1977); H. GELLER, THE FAIRNESS DOCTRINE IN BROADCASTING (1973); S. SIMMONS, THE FAIRNESS DOCTRINE AND THE MEDIA (1978); Price, *Taming Red Lion: The First Amendment and Structural Approaches to Media Regulation*, 31 FED. COM. L.J. 215, 217 n.13 (1979).

299. *See, e.g.*, Thomas v. Review Board, 450 U.S. 707, 718–19 (1981) (member of Jehovah's Witnesses, who voluntarily quit his job because it conflicted with his sincere religious beliefs, held entitled to exemption from general rule that unemployment compensation will not be paid to individuals who voluntarily quit their jobs); *Yoder*, 406 U.S. 205, discussed *supra* text accompanying notes 269–79; *Sherbert*, 374 U.S. 398, discussed *supra* text accompanying notes 265–68; *Barnette*, 319 U.S. 624, discussed *supra* text accompanying notes 194–97. Indeed, in Estate of Thornton v. Caldor, 105 S. Ct. 2914 (1985), the Court recently held an accommodation measure to violate the establishment clause

In addition to seeking accommodation remedies within the public school system, students whose arguably religious beliefs are burdened by public school curricular decisions have another alternative course for avoiding this burden: they may opt out of the public schools altogether.[300] In *Pierce v. Society of Sisters*,[301] the Supreme Court recognized that parents have a fundamental right to educate their children in matters of morals and religion consistently with their own beliefs.[302] By protecting

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precisely because it directly affected individuals beyond those asserting a free exercise claim. *See id.* at 2918 (state statute providing that employee may not be required to work on day s/he designates as Sabbath "imposes on employers and [other] employees an absolute duty to conform their business practices to the particular religious practices of the employee" asserting the right to Sabbath observance).

The conclusion that these proposed curricular reforms would violate the establishment clause is further supported by Buchanan, *supra* note 264. These reforms create problems under all of the criteria that Buchanan proposes for evaluating accommodation measures pursuant to the establishment clause: by forcing a change in curriculum for all students, which is compatible with the religious beliefs of some, they would both pervasively disrupt the school's secular educational function and severely constrain the freedom of choice of students not asserting free exercise claims; because each reform would require schools to acquire new textbooks and other materials, the attendant financial costs would be substantial; to the extent that either curricular reform is instituted as a result of generally applicable legislation rather than pursuant to the specific requests of particular parents or children, the reform reflects excessive governmental initiative; unless similar reforms are made in other aspects of the curriculum, to accommodate non-religious beliefs, the reform is not ideologically neutral; and if the reform applies to younger public school students, as well as older ones, it is more likely to create establishment clause problems.

The proposed curriculum reforms would also violate the two criteria for permissible accommodation measures specified in Dorsen & Sims, *supra* note 291. First, under either curriculum reform, the state would not be "genuinely removing obstacles to free exercise," but rather, "supplementing opportunities which already exist" for the study of the creationist theory of origins and other matters allegedly inconsistent with secular humanism. Second, the state would not be "merely . . . providing services secular and neutral in themselves," but rather would be "directly involved in religious activity" by mandating a curriculum consistent with certain religious beliefs.

See also supra note 293 (explaining why exemption is appropriate remedy when instruction conflicts with arguably religious belief, even assuming there may be indirect social pressure to forego exemption).

300. Some fundamentalist Protestant children who complained about secular humanism in the reading textbooks involved in the *Mozert* case, *see supra* text accompanying notes 43–61, subsequently withdrew from the public schools and enrolled in private sectarian schools. *See* Morristown, Tennessee Citizen Tribune, June 23, 1985, "Textbooks Case to Get Full Hearing" (school superintendent quoted as saying that none of the children in Citizens Organized for Better Schools, which was organized by lead named plaintiff Robert Mozert, were currently registered in public schools). Among the relief sought in the *Mozert* action is reimbursement for the costs of sending children to private schools. *See* Complaint in Mozert, et al. v. Hawkins County Public Schools, et al., No. CIV–2–83–401, U.S. Dist. Ct. for E. Dist. of Tenn., NE Div., filed Dec. 2, 1983, at ¶¶ 2.4, 6.6. *See* Hitchcock, *supra* note 16, at 20:

> An acute area of conflict has been the growing tendency of some Protestants to establish their own schools. Such establishments have come under attack by various government agencies, including the Internal Revenue Service (charging improper claims of tax exemption) and state departments of education demanding control of accreditation. . . . [T]he supporters of the school in question claim that conscience, particularly with relation to freedom of religion, forbids them to enroll their children in public schools. More radical yet is the contention of some parents that the moral character of existing schools requires them to educate their children at home, in accord with their own beliefs.

The Supreme Court would not have had to excuse the Wisconsin Amish community from the state's compulsory school requirement in *Yoder*, *see supra* text accompanying notes 269–79, if the state had approved an alternative, sectarian form of education. As the Court noted, other states with substantial Amish communities permitted high school-aged Amish youth to satisfy compulsory education requirements by attending special vocational schools part-time, and performing supervised farm and household duties part-time. The Wisconsin Superintendent of Education had refused to approve such an alternative, however. *See Yoder*, 406 U.S. at 208 n.3, 236 n.23.

301. 268 U.S. 510 (1925).

302. In *Pierce*, the Supreme Court struck down a state law requiring all students to attend public schools. In Meyer v. Nebraska, 262 U.S. 390 (1923), the Court struck down a state law forbidding the teaching of foreign languages before the eighth grade. Both decisions were based on the then prevalent, but subsequently discredited, "substantive due process" theory. However, both "have remained durable and fertile sources of constitutional doctrine concerning the . . . limits of governmental power to homogenize the beliefs and attitudes of the populace." L. TRIBE, *supra* note 152, § 15–6, at 902–03. According to Professor Tribe, "[t]he cardinal principle animating" the *Meyer* and *Pierce* decisions

> . . . was that the state had no power to "standardize its children" [*Pierce*, 268 U.S. at 535] or "foster a

the right to satisfy compulsory education requirements through private, sectarian schools, the state provides an additional means for accommodating the arguably religious beliefs of parents and students that are burdened by public school curricular decisions.[303] To maintain private, sectarian schools as a meaningful option,[304] state licensing requirements and other regulations must be reasonable, and not deter the formation or maintenance of such schools.[305] When applied to a sectarian school, a state regulation may impinge upon the free exercise rights of the school's students and their parents.[306] If so, the regulation should not be sustained unless it could withstand the analysis outlined in this Part.[307]

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homogeneous people" [*Meyer*, 262 U.S. at 402] by completely foreclosing the opportunity of individuals and groups to heed the music of different drummers. The child was not deemed "the mere creature of the State." [*Pierce*, 268 U.S. at 535].

Id. at 903.

303. *See, e.g.*, Yudof, *supra* note 199, at 890 (construes *Pierce* "as telling governments that they are free to establish public schools and to make education compulsory for certain age-groups, but they are not free to eliminate competing private sector institutions that promote heterogeneity in education").

304. To the extent that private schools are not a viable option for the families unable to afford their tuition, the first amendment rights of such families may be correspondingly diminished. *See* Arons & Lawrence, *supra* note 186, at 326–27:

The present method of financing and controlling American public schooling discriminates against the poor and working class, and even a large part of the middle class, by conditioning the exercise of first amendment rights of school choice upon an ability to pay, while simultaneously eroding that ability . . . through the regressive collection of taxes used exclusively for public schools.

Accord, Shiffrin, *supra* note 192, at 568. *But see* passage from Hirschoff quoted *supra* note 293 (suggesting that first amendment values may be promoted by students with minority religious beliefs remaining in public schools, notwithstanding the indirect coercion to which such beliefs may be subject).

305. *See, e.g.*, Yudof, *supra* note 199, at 890:

The state may make some demands of private schools in satisfaction of compulsory schooling laws, but those demands may not be so excessive that they transform private schools into public schools managed and funded by the private sector. The integrity of the communications and socialization processes in private schools and families remains intact, while the state's interest in producing informed, educated, and productive citizens is preserved.

306. *See* Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 788 (1973) ("[A] state law interfering with a parent's right to have his child educated in a sectarian school would run afoul of the Free Exercise Clause"); Norwood v. Harrison, 413 U.S. 455, 461 (1973) ("[A] State's role in the education of its citizens must yield to the rights of parents to provide an equivalent education for their children in a privately operated school of the parents' choice."). *See also* Dayton Christian Schools v. Ohio Civil Rights Comm'n, 766 F.2d 932 (6th Cir. 1985), (held that free exercise and establishment clauses would be violated by allowing Ohio Civil Rights Commission to assert jurisdiction over discharged teacher's employment discrimination complaint against religious school, which declined to rehire teacher for failing to follow "Biblical Chain-of-Command" and instead consulting attorney after school had informed her she would not be rehired because she was pregnant and because of school's asserted religious belief that mothers should be home with pre-school children). On June 27, 1986, the Supreme Court reversed the Sixth Circuit's judgment, which had enjoined the Commission's exercise of jurisdiction, and remanded the case for further administrative proceedings. 106 S. Ct. 2718 (1986). The five-Justice majority held that the district court should have abstained from adjudicating the case, based upon concerns of comity and federalism. *Id.* at 2722-23. The four concurring Justices reasoned that the case was not yet ripe for adjudication, because any religious freedom challenge to a remedy that the Commission might order would be premature. *Id.* at 2726. All nine Justices agreed that neither the Commission's investigation of the sex discrimination charges nor its conducting of a hearing on those charges violated the first amendment's religion clauses. *Id* at 2723 and 2726 n.4. This case is the subject of another article in the present issue: Wolman, *Separation Anxiety*, 47 OHIO ST. L.J. 453 (1986).

307. *See* State v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976) (extensive state regulation of private sectarian schools held an unconstitutional burden on parents' free exercise of religion and liberty to direct their children's education). For a more expansive articulation of the types of state regulation of sectarian schools that might violate the free exercise clause, *see* Bird, *Freedom From Establishment and Unneutrality in Public School Instruction and Religious School Regulation*, 2 HARV. J. L. & PUB. POL. 125, 194–95 (1979):

In summary, regulation of religious schools abridges free religious exercise of parents, students, and churches if it burdens provision of religious-centered instruction by an accreditation requirement that compels compliance with intrusive standards to operate as a school and to satisfy the compulsory education law; by a textbook

VI. Application of Proposed Standards to Particular Cases Challenging Secular Humanism and Scientific Creationism in Public School Curricula

The application of the proposed standards for evaluating establishment and free exercise clause challenges to public school curricular decisions will be illustrated in the context of two current cases involving secular humanism and scientific creationism, respectively. The two cases that have been selected for examination are *Mozert* and *Aguillard*. These two cases have been selected for further discussion because both have provoked conflicting analyses and conclusions by the various judges who have thus far ruled upon them, and because neither has yet been finally resolved; the *Mozert* case was recently tried on remand and probably will be appealed to the Sixth Circuit again, and the Supreme Court will review the *Aguillard* case during its 1986–87 Term.

A. Mozert v. Hawkins County Public Schools[308]

1. *Establishment Clause Analysis*

The *Mozert* plaintiffs did not pursue an establishment clause claim. They did not object to other students' using the challenged reading textbook series, and they consequently did not seek to ban the books from the schools.[309] However, in other cases where parties have asserted that textbooks convey secular humanist values, they have sought to remove them from the schools altogether, claiming that their use by any students violates the establishment clause.[310] Therefore, it is instructive to analyze the *Mozert* record to assess whether it would support an establishment clause claim under the proposed standards.

To make a *prima facie* case of an establishment clause violation, the plaintiffs would have to demonstrate that the use of the textbooks was intended or reasonably perceived as conveying the school's approval or disapproval of arguably religious beliefs.[311] The evidence described in the *Mozert* decisions makes clear that plaintiffs could not have stated even a *prima facie* establishment clause claim. As discussed above,[312] the contents of assigned books could not alone support a *prima facie* claim that their classroom use had the proscribed purpose or effect, except in the unlikely

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approval requirement that forces use of objectionable texts approved by state officials; or by a teacher certification requirement that prevents securing instructors with the requisite religious-based education and disqualifies teachers with the requisite theological convictions . . . [or] if it restrains provision of religious-centered education by a minimum curriculum standard that compels instruction in objectionable subjects or allocates excessive time away from religious instruction; by intrusive periodic reports that demand disclosure of nonessential information or that consume excessive amounts of administrative time; or by minimum facility requirements that inflict great expenses for nonessential structural surroundings.

308. 579 F. Supp. 1051 (E.D. Tenn. 1984) (dismissing all but one allegation in complaint); *aff'd in part & rev'd in part*, 582 F. Supp. 201 (E.D. Tenn. 1984); *rev'd & remanded*, 765 F.2d 75 (6th Cir. 1985). These decisions are discussed *supra* text accompanying notes 43–61.

309. 765 F.2d at 76.

310. In the four other reported cases concerning challenges to secular humanism in public school curricula, the complaints alleged that the material violated the establishment clause, and sought to eliminate it from the curriculum. *See supra* text accompanying notes 32–42, 62–79.

311. *See supra* text accompanying note 218.

312. *See supra* text accompanying notes 249–52.

situation that the books were not the subject of any class discussion or presentation. Even assuming that secular humanism is arguably religious, and even assuming further that a reasonable student might perceive the school's assignment of the challenged books, standing alone, as conveying its approval of secular humanism or its disapproval of other arguably religious beliefs, these findings would not be dispositive if the books were the subject of teacher presentation or class discussion. Under those circumstances, any inference that a reasonable student might draw from the books' contents, viewed in isolation, would not be determinative because the students would not in fact be exposed to the books in isolation. The plaintiff would have to present some evidence that the mode in which the books were actually taught conveyed the prohibited message, or had the purpose of doing so.

Even assuming the instructional mode did not dispel any pro- or anti-religious message that might have been contained in the challenged textbooks, viewed alone it still seems unlikely that the *Mozert* plaintiffs would have been able to make out a *prima facie* establishment clause claim. Pursuant to the district court's directions, the plaintiffs identified the books' passages that they viewed as supporting secular humanism and undermining their own religious beliefs.[313] This exercise demonstrated that plaintiffs objected to the promotion of certain attitudes or values which are fundamental to our constitutional system, and which courts have held the public schools may—and, indeed, should—promote: a tolerance for diverse nationalities, cultures, and religions; and a belief in equality of individual opportunity regardless of such uncontrollable factors as nationality, sex or creed.[314] Even if these fundamental values were contrary to and hence undermined plaintiffs' arguably religious beliefs, public schools would still not violate the establishment clause by inculcating them.[315] Plaintiffs' remedy, if any, would lie under the free exercise clause.[316]

An additional flaw in any establishment clause claim that the *Holt Basic Readers* should be removed from the Hawkins County, Tennessee public schools is that such removal would itself raise problems under the establishment clause, as well as the free speech clause. As with the Arkansas law prohibiting the teaching of evolution, which the Supreme Court held unconstitutional in *Epperson*, the sole reason that these materials would be removed from the public school curriculum would be their inconsistency with certain arguably religious beliefs.[317] Its purpose and effect would therefore be to convey the school's approval of the plaintiffs' arguably religious beliefs, as well as its disapproval of any contrary arguably religious beliefs. A court

313. *See* 582 F. Supp. at 201.

314. *See supra* note 44.

315. *See supra* text accompanying notes 223–32.

316. *See supra* notes 231–32 & accompanying text; *see also supra* text accompanying notes 300–07. Even if the *Mozert* plaintiffs could make out a *prima facie* establishment clause claim, the school authorities would probably be able to overcome it by showing that the purpose and effect of using the challenged textbooks was to advance reasonable educational policies. *See* 765 F.2d at 76 (school superintendent stated that challenged textbooks were selected because they were very instructive and substantially enhanced reading skills). Even if the plaintiffs could demonstrate that the books had been selected expressly to advance pluralistic, tolerant values abhorrent to their religious beliefs, this purpose would reflect a reasonable educational policy. A public school's fostering of such values constitutes an important part of its educational mission. *See supra* text accompanying notes 131–33, 227–29.

317. *See Epperson*, discussed *supra* note 80: "No suggestion has been made that Arkansas' [anti-evolution] law may be justified by considerations of state policy other than the religious views of some of its citizens."

might well also find that this type of book removal violates the free speech standard enunciated in *Pico*, because the dispositive motivating factor underlying the removal was the intent to suppress certain ideas.[318]

2. *Free Exercise Clause Analysis*

The issues that the Sixth Circuit Court of Appeals remanded for trial in *Mozert* concerned plaintiffs' free exercise claim. The evidence described in the reported decisions is insufficient to indicate whether the plaintiffs could make out any elements of a *prima facie* free exercise claim. However, the record also does not clearly indicate that plaintiffs were incapable of stating a *prima facie* claim, as a matter of law. Therefore, the Sixth Circuit appropriately remanded the case for further development of the factual record.

From the evidence described in the decisions, one cannot conclude whether plaintiffs could show the first element of a *prima facie* free exercise claim—that an arguably religious belief, which is both sincerely held and centrally important, is substantially burdened by the challenged governmental policy or action.[319] The plaintiffs alleged that their sincere religious beliefs would be violated by the mere exposure to the ideas and values conveyed by the challenged *Holt Basic Readers*. Although the school system denied these allegations, it apparently did not proffer any evidence demonstrating that exposure to the allegedly offensive books would not violate plaintiffs' religious beliefs.[320] Therefore, for purposes of the school's summary judgment motion, these allegations should have been deemed true, requiring the motion to be denied.[321] Accordingly, the district court should not have summarily dismissed plaintiffs' claims that their religious beliefs were violated by exposure to various concepts contained in the challenged textbooks, including humanistic values. The district court concluded, apparently as a matter of law, that "[n]o basic Constitutional values are implicated in the allegations that the *Holt Basic Readers* depict witchcraft, the worship of idols, situational ethics, disrespect for parents, the theory of evolution, or the values of humanism."[322]Yet, properly understood, these allegations raise questions of fact.

Under the free exercise principles and authorities discussed above,[323] a court could not correctly rule that no arguably religious belief, which is sincerely held and centrally important, could ever be violated by exposure, in a public school curriculum, to the ideas and values allegedly contained in the *Holt Basic Readers*. Therefore, whether such exposure violates the particular beliefs asserted in any specific case

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318. *See supra* text accompanying notes 139–44, and text accompanying note 271.

319. *See supra* text accompanying note 288.

320. 765 F.2d at 78.

321. Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2727, p. 124 (1983) (on summary judgment motion, any disputed material fact must be resolved against moving party). *See also* Advisory Committee Note to Rule 56(e), Federal Rules of Civil Procedure, 1963 Amendment ("Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented.").

322. 579 F. Supp. at 1053.

323. *See supra* text accompanying notes 259–68.

depends upon a factual examination of those beliefs.[324] Moreover, religious liberty concerns suggest that a court should not probe too deeply into the sincerity of an alleged religious belief, including an alleged belief in a religious duty to avoid exposure to certain concepts or attitudes. The values underlying the first amendment's religion clauses dictate that, in evaluating an asserted religious belief, a court should to some extent defer to the allegations of those who profess it.[325]

The reported *Mozert* decisions also do not contain enough information to warrant any firm conclusions about whether plaintiffs could establish the remaining two elements of a *prima facie* free exercise claim: (1) that any compelling interest promoted by the challenged reading program could be substantially achieved even if the proposed accommodation remedy is granted; and (2) that the proposed accommodation remedy is no more extensive than necessary to eliminate any free exercise violation, would not cause significant inconvenience, and would not for any other reason violate the establishment clause.[326]Although further light should be shed on these two requirements by evidence adduced at the trial on remand, the accommodation remedy proposed by plaintiffs—to be excused from any class where the challenged books are read or discussed and to hold their own alternative reading classes using other state-approved texts to which they had no religious objections—should probably satisfy the first requirement. Even assuming the school has a compelling interest in imparting reading skills to its students, it probably could not show a compelling interest in pursuing this goal through the specific means of requiring every student to read from, and to participate in discussions about, the *Holt Basic Readers*. To the contrary, plaintiffs could probably show that the reading skills that the school sought to develop through the challenged texts could be developed, substantially as effectively, through alternative texts. The plaintiffs themselves specified that any alternative text should have state approval,[327] which would be indicative of its educational suitability.

The *Mozert* plaintiffs may also be able to show that the proposed alternative reading program would not be unduly extensive or inconvenient, or otherwise violate the establishment clause. The plaintiffs might support such a showing, for example, by themselves undertaking to bear any administrative or financial costs associated with the alternative reading program. Even if the plaintiffs bore the direct burden of running

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324. *See* Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 314 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978) (whether or not adherence to particular philosophy constitutes religious belief entitled to constitutional protection is question of fact). It should be stressed that plaintiffs could not make the necessary prima facie showing merely by demonstrating a conflict between their arguably religious, sincerely held, centrally important beliefs and the values allegedly conveyed by the challenged textbooks. *See supra* note 221 and accompanying text & note 288. Plaintiffs would further have to demonstrate that these beliefs prohibited their exposure to the values allegedly conveyed by the books. The evidence described in the reported decisions to date does not indicate whether plaintiffs could make this showing. *See supra* text accompanying notes 46–53.

325. *See supra* note 260. The court would also have to consider any contrary evidence that defendants might submit on this issue. While plaintiffs' characterization of their own religious beliefs should be given substantial weight, it should not be determinative. *See* L. TRIBE, note 152, § 14–12, at 864 (emphasis in original):

> [W]hen a claimant avers that a prohibition or requirement conflicts with a central tenet of his or her own faith, the appropriate inquiry may begin but cannot end by looking to the dogma of any particular religious tract or organization; the ultimate inquiry must look to the claimant's sincerity in stating that the conflict is indeed with a tenet central *for that individual*. . . . [T]his ultimate inquiry must not degenerate into an inquisition.

326. *See supra* text accompanying notes 288–92.

327. 579 F. Supp. at 1052.

an alternative reading program, though, the program would not pass muster under the establishment clause if it imposed any substantial indirect burden upon the schools—for example, by inconveniencing the rest of the students. The plaintiffs would have to show that the alternative reading program would not unreasonably interfere with the school's normal operations. Such a showing could perhaps be satisifed by plaintiffs' arrangement of a release time program, whereby the religiously objecting students would receive alternative reading instruction off the school premises.[328]

As noted above, a significant factual consideration in assessing whether any accommodation arrangement would survive establishment clause scrutiny would be the number of students participating in it.[329] In the *Mozert* case, the larger the number of students who absented themselves from a regular reading class to pursue alternative reading instruction, the greater the interference with the school's functioning would be, and the more likely that a reasonable student would perceive the school as approving the excused students' arguably religious beliefs. Another material fact is whether and how a school explains any alternative reading program to its student body. Potential establishment clause concerns, which might otherwise arise from an alternative curricular program, could potentially be mitigated by an explanation designed to dispel reasonable inferences that the school approves religion.[330]

The Hawkins County school system would assume the burden of justifying its rejection of plaintiffs' proposed alternative reading program only if plaintiffs could demonstrate each element of a *prima facie* free exercise claim through some specific evidence. If the burden were thus shifted to the school system, it likewise could be satisfied only through specific evidence.[331] It should be noted, finally, that the *Mozert* plaintiffs may be able to prevail on part, but not all, of their accommodation proposals. For example, plaintiffs could probably demonstrate the appropriateness of

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328. *Cf.* Zorach v. Clauson, 343 U.S. 306 (1952) (upholding program whereby public school students whose parents made written requests could leave school during school day and go to religious centers for religious instruction).

329. *See supra* note 292 and accompanying text.

330. *See supra* note 256 and accompanying text.

331. The Sixth Circuit opinion in *Mozert* quotes an affidavit of the school superintendent stating that if plaintiffs were permitted to opt out of the regular reading program and to hold their own alternative classes, " 'teachers would have no control over the management, they could not possibly teach skills in sequential order and the teaching-learning process would become completely unmanageable chaos.'" 765 F.2d at 76. The Sixth Circuit's opinion does not refer to any affidavit that refutes these opinions. Plaintiffs have the burden of making a prima facie showing that their proposed alternative reading program would not be unduly inconvenient. Therefore, if the Superintendent had expressed at the trial the same opinions set forth in his affidavit, and if plaintiffs had offered no contrary evidence, the district court would have appropriately dismissed plaintiffs' complaint. However, since the Superintendent's affidavit concerned disputed factual issues in the context of a summary judgment motion, the district court should have resolved these issues in plaintiffs' favor. *See supra* note 321.

If assertions of the type made by the Superintendent in *Mozert* sufficed to defeat a free exercise challenge to curricular materials, in which students sought to read alternative textbooks or to participate in some other accommodation strategy, then no such challenge could ever succeed. If plaintiffs make a prima facie showing that a proposed accommodation measure would not cause significant inconvenience or otherwise violate the establishment clause, then the school should not be able to defeat plaintiffs' claim through conclusory assertions of inconvenience. Rather, it would have to submit specific evidence from which it appears, by a preponderance, that the predicted adverse results would be likely to occur under the particular circumstances. To impose any less of an evidentiary burden upon the school would be to create, in effect, a per se rule that a public school student never has a free exercise right to read alternative materials to those assigned by the school. Such a sweeping rule is inconsistent with free exercise clause principles. *See generally supra* text accompanying notes 259–68.

the public school system's providing religiously objecting students with alternative reading textbooks more easily than they could demonstrate the appropriateness of its providing these students with alternative classrooms, teachers, courses of instruction or examinations.

B. Aguillard v. Edwards[332]

1. *Establishment Clause Analysis*

As discussed above, the fact that curricular material coincides with arguably religious beliefs does not necessarily require the material to be excised from the curriculum on establishment clause grounds.[333] Accordingly, the coincidence between the creation science theory required to be taught under Louisiana's balanced treatment act and certain religious beliefs does not alone render the act violative of the establishment clause. However, the additional evidence adduced by the *Aguillard* plaintiffs—beyond the mere coincidence between scientific creationism and religious creationism—does support a *prima facie* claim that the act was intended to convey governmental approval of arguably religious beliefs.

As discussed above, factors that indicate the purpose of a governmental policy or action include its effect, its historical background, the sequence of events preceding its adoption, any departures from ordinary procedural approaches or substantive principles in connection with its adoption, and its legislative history.[334] In *Aguillard*, there was evidence concerning three of these factors, and all three suggested that the challenged statute was intended to indicate governmental approval of arguably religious beliefs. First, the historical background and sequence of events leading to the enactment of the Louisiana statute paralleled the historical background and events leading to Arkansas' enactment of its balanced treatment act, which was described in greater detail in *McLean*.[335] The Louisiana statute was expressly patterned upon both the Arkansas law, which was invalidated in *McLean*, and the model balanced treatment act, which had been drafted and promoted by a fundamentalist Protestant organization.[336] Therefore, the *McLean* court's conclusion—that the events giving rise to the Arkansas legislation demonstrated its intent to convey governmental approval of arguably religious beliefs—is equally applicable to the Louisiana legislation.

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332. 765 F.2d 1251 (5th Cir. 1985), *petition for rehearing en banc denied*, 778 F.2d 225 (5th Cir. 1985); *probable jurisdiction noted*, 106 S. Ct. 1946 (1986). These decisions are discussed *supra* text accompanying notes 117–27.

333. *See supra* text accompanying notes 221–22.

334. *See supra* text accompanying notes 243–45.

335. 529 F. Supp. at 1258–63. *See supra* text accompanying notes 101–06.

336. State Senator Keith, who introduced the Louisiana statute, received a copy of the model act from Paul Ellwanger, the founder and president of a fundamentalist Christian group called Citizens For Fairness In Education. Mr. Ellwanger also advised Senator Keith on how to ensure enactment of the model legislation. Noting that he viewed the effort to pass the act as a "battle . . . between God and anti-God forces," Mr. Ellwanger advised Senator Keith, as a tactical matter, to de-emphasize the content of creation science, to emphasize criticisms of evolutionary theories, and to keep religious supporters of the measure behind the scenes. *See* letters from Mr. Ellwanger to Senator Keith, cited in Brief for Appellees at 24 n.4 & 25 n.1, Aguillard v. Edwards, 765 F.2d 1251 (5th Cir. 1985) [hereinafter cited as Brief for Appellees].

The legislative history of the Louisiana act also indicates that it was intended to convey the government's approval of certain arguably religious beliefs held by fundamentalist Protestants. The lead witness testifying in support of the bill was a member of the Creation Research Society, a religious organization that requires its members to adhere to a literal interpretation of the Bible.[337] This witness criticized Darwin's evolutionary theories as "contrary to Biblical teachings," and emphasized the central role of a Creator in creation science.[338] The act's legislative history contains additional, similar references to a divine creator and other religious concepts.[339]

Based upon the foregoing evidence,[340] the *Aguillard* plaintiffs made a *prima facie* showing that the intent of the Louisiana statute was to express governmental endorsement of the arguably religious belief in divine creation. The burden of proof was consequently shifted to defendants. Even construing the evidence most strongly in defendants' favor, they did not satisfy their burden of showing, by a preponderance of the evidence, that the statute had neither the purpose nor the effect of conveying the government's approval of arguably religious beliefs. Therefore, the Court of Appeals for the Fifth Circuit correctly affirmed the district court's grant of summary judgment in plaintiffs' favor.

The defendants could have overcome plaintiffs' *prima facie* showing by demonstrating that the statute's purpose and effect were to promote a reasonable educational policy.[341] Defendants attempted to do this by trying to prove, specifically, that the statute's purpose and effect were to "protect academic freedom."[342] However, on its face, the statute belied this avowed purpose. Absent the statute, nothing would have prevented any school teacher who so chose from discussing any scientific shortcomings in evolutionary theory, or any scientific

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337. *See McLean*, 529 F. Supp. at 1260 n.7.

338. *See* statement of Edward Boudreaux, cited in Brief for Appellees, *supra* note 336, at 26:

> Creation . . . requires the direct involvement of a supernatural intelligence, and this cannot be directly tested by the scientific method . . . . It takes faith to accept creation as a viable explanation of origins . . . .

339. Other witnesses supporting the Louisiana statute testified to the antagonism between creation theory and evolution theory, and some suggested that the preferred "solution" would be to forbid the teaching of evolution altogether. State Senator Keith explained that he sponsored the bill of his concern that, as science was being taught in the public schools, his son would be coerced to abandon his belief that "God created the world and God created man." In addition, Senator Keith discussed the responsibility of the Creator "for everything that is in this world," and the importance of including this concept in "science." *See* Brief for Appellees, *supra* note 336, at 24–26, 32, 46.

340. Although the *Aguillard* decisions did not recite the relevant facts on this point, the balanced treatment approach embodied in the challenged statute probably constitutes a departure from general substantive law principles, which is yet another factor pointing toward a proscribed purpose. *See supra* text accompanying notes 243–45. There is probably no equivalent requirement that any other subject taught in the Louisiana public school system be given a balanced treatment, or that any other particular theory be taught only on condition that some other theory also be taught. *See* citation from Levit, *supra* note 217.

The three remaining types of evidence that often provide an indication of the purpose underlying a governmental policy or action are evidence concerning: any proscribed effect that the challenged action might have, any previous similar governmental policy or action, and any departure from regular procedural channels. *See supra* text accompanying note 245. There was no evidence whatsoever concerning the statute's effect, because it never went into effect. The district court enjoined the statute's implementation, and the Court of Appeals affirmed this ruling. *See* 765 F.2d at 1253–54. The *Aguillard* decisions did not indicate that any departure from normal procedures accompanied the enactment of the Louisiana statute, and the decisions did not indicate whether any previous Louisiana legislation dealt with the teaching of origins in public schools.

341. *See supra* text following note 256.

342. 765 F.2d at 1256.

evidence supporting a different theory of origins, including a creation theory.[343] Because the act did not give Louisiana school teachers an option they would not otherwise have had, it did not enhance their academic freedom. To the contrary, the act diminished teachers' academic freedom by removing from them an option they had before its passage—to teach evolution theory without being forced also to teach creation science.[344]

The Fifth Circuit judges who dissented from the denial of defendants' petition for a rehearing en banc essentially argued that the statute was justified by another primary purpose and effect related to educational policy—to assure the teaching of "the whole truth" about the subject of origins.[345] This is probably not a fair characterization of the statutory purpose, however. If the Louisiana legislature had been genuinely concerned with complete or balanced presentations in the public schools, it probably would not have confined the statute to evolution theory and creation theory. Rather, it would have required balanced treatment of at least all scientific subjects, if not all subjects in general.[346] However, even assuming the Louisiana legislature did enact the creation science statute to assure that the public school gave fair coverage to the subject of origins, summary judgment invalidating the law would still have been appropriate. The reason is that defendants would not be able to show, by a preponderance of the evidence, that the statute's effect was neutral vis-a-vis any arguably religious belief. Specifically, by singling out for a balanced treatment requirement one particular theory, which happened to coincide with arguably religious beliefs, the statute's effect—even if not its purpose— was to convey governmental approval of those beliefs.[347]

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343. *See id.* at 1257.

344. The *McLean* opinion, *see supra* text accompanying notes 99–116, indicated that the Arkansas balanced treatment act might well violate the first amendment's free speech clause precisely because it curtailed teachers' academic freedom. 529 F. Supp. at 1273–74. The court did not make a definitive ruling on this issue, probably because it had already held the act unconstitutional on establishment clause grounds. *Id.* at 1264, 1266, 1272. Justice Stewart thought that the Arkansas statute prohibiting the teaching of evolution, which the Supreme Court held to violate the establishment clause in *Epperson*, impinged upon the first amendment's "guarantees of free communication." *See supra* note 80.

345. *See* 778 F.2d at 226.

346. Similarly, as the panel decision observed, if the Louisiana legislature had genuinely intended to promote creation science because it comprised an essential element of scientific "truth," the legislature would have required creation science to be taught regardless of whether evolution was also taught. For this reason, the panel concluded that "a primary academic interest in creation-science would seem to be gainsaid." 765 F.2d at 1257.

347. *See supra* note 217. Under the analysis outlined in the text, it would not be necessary to reach the question of whether scientific creationism is essentially scientific or religious in nature.For the reasons set forth, Louisiana's balanced treatment act should be held to violate the establishment clause, even assuming that scientific creationism were based upon substantial scientific evidence and merely coincides with certain religious beliefs. A court would have to rule upon the scientific-versus-religious nature of creation science only if it did not hold the coincidence between scientific creationism and certain religious beliefs sufficient to render the statute's primary purpose and effect illicit. Under those circumstances, the statute should still be held to violate the establishment clause if the court found (as the *McLean* court did, *see supra* text accompanying note 107) that scientific creationism not only coincides with religious beliefs, but in fact embodies them, having no independent scientific basis. Much scientific authority supports this view. *See, e.g.*, Eldredge, *Creationism Isn't Science*, New Republic, Apr. 14, 1981, at 15–16; Gould, *Evolution as Fact and Theory*, Discover, May 1981, at 35; Kyle, *Should "Scientific" Creation and the Science of Evolution be Taught with Equal Emphasis?*, 17 J. Research Science Tchng. 519, 525 (1980); *see also* Alexander, *Evolution, Creation and Biology Teaching*, Am. Biology Tchr., Feb. 1978, at 91, 91–92; Godfrey, *The Flood of Antievolutionism*, Nat. Hist., June 1981, at 4, 4. At least in part because of their view that creation science is not actually scientific, scientific organizations have officially opposed its inclusion in public school curricula. *See* Physics Today, Feb. 1982, at 53 (these organizations include the Council of the American Physical Society, the American Geological Institute, the National Academy of Sciences, and the National Association of Biology Teachers).

2. *Free Exercise Clause Analysis*

The decisions in *Aguillard* do not indicate that the defendants made any free exercise arguments in support of the challenged statute. However, some advocates of the balanced treatment of evolution and scientific creationism have argued that it is justified—indeed, even mandated—by free exercise principles.[348] Therefore, it is instructive to examine this argument in the context of the *Aguillard* record.

The free exercise rationale for the balanced treatment approach is premised on the view that a public school's exclusive teaching of evolution theory violates free exercise rights, and that the teaching of creation theory, as well as evolution theory, is an appropriate accommodation measure, eliminating the violation.[349] To sustain this free exercise argument, proponents of balanced treatment legislation would have to make the three following *prima facie* showings: (1) that arguably religious beliefs, which were sincerely held and centrally important, were violated by exposure to evidence supporting evolution, but not creation, in the public schools; (2) that the schools have no compelling interest in presenting evidence supporting evolution without being required also to present evidence supporting creation; and (3) that the balanced treatment remedy is no more extensive than necessary to eliminate the alleged free exercise violation, it does not cause significant inconvenience, and it does not otherwise violate the establishment clause.[350]

For the reasons discussed above, the third element of the required *prima facie* showing could not be made out.[351] Therefore, the asserted free exercise rationale for balanced treatment legislation should be rejected without any need to determine whether the remaining two essential showings could be made. The balanced treatment approach would not be a constitutionally permissible accommodation measure to rectify any free exercise clause violation that might result from the teaching of

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It has also been argued that the balanced treatment act violates the establishment clause because it creates excessive entanglement between government and religion. *See, e.g.*, Project, *The Lessons of Creation-Science: Public School Curriculum and the Religion Clauses*, 50 FORDHAM L. REV. 1113, 1153–55 (1982) (because creation science entails concepts closely related to religious doctrine, if it were included in public school curricula, state would have to monitor classroom materials and discussions constantly, causing impermissible entanglement).

Balanced treatment legislation could also be found to violate other constitutional guarantees, in addition to the establishment clause. For example, in *McLean*, 529 F. Supp. at 1273, the court indicated that the Arkansas version of this legislation might violate the free speech clause because it curtailed teachers' academic freedom. *See supra* note 344. The plaintiff teachers in *McLean* also contended that the balanced treatment act is impermissibly vague, in violation of the fourteenth amendment's due process clause. 529 F. Supp. at 1257. Although the *McLean* court did not find this argument persuasive, *id.* at 1273, it should be recalled that in *Epperson*, Justices Stewart and Black opined that Arkansas' predecessor statute should be held unconstitutional on precisely this ground. *See supra* note 80.

348. For example, this argument was asserted in two of the reported cases concerning creation science in public school curricula, *Wright* and *McLean*. *See supra* text accompanying notes 87–88, 116. This argument is also set forth in Note, *supra* note 82.

349. *See, e.g.*, Note, *supra* note 82, at 550–65, 570.

350. *See supra* text accompanying notes 288–92.

351. *See supra* text accompanying notes 297–99; notes 264, 293, 297, 299. All the factors discussed by Buchanan, *supra* note 264—for evaluating accommodation measures specifically in the public school setting—indicate that the Louisiana balanced treatment act is not a permissible measure for accommodating religious beliefs, but instead violates the establishment clause. It would pervasively disrupt the school's secular educational function and constrain the freedom of choice of students not asserting free exercise claims; it would impose substantial financial costs upon the schools; because it constitutes statewide legislation rather than a response to individual requests, it reflects excessive governmental initiative; because it was unaccompanied by similar reforms designed to accommodate non-religious beliefs, it is not ideologically neutral; and it applies to all public school students, regardless of their age or grade level.

evolution theory. Such a measure would be overbroad, in that it would "protect" students who did not even assert, let alone suffer, any infringement of free exercise rights. By imposing upon all students a curriculum dictated by the arguably religious beliefs of some, the balanced treatment requirement does not merely accommodate these beliefs, but rather promotes them. It conveys to reasonable students the message that the school approves the arguably religious beliefs of those who advocate creation science or balanced treatment. Because it directly affects all students, and not just those who assert free exercise claims, the balanced treatment approach is distinguishable from all accommodation measures that have received Supreme Court approval. The direct effect of all previously approved accommodation measures was confined specifically to those individuals asserting a free exercise claim.[352]

Any free exercise violation that might result from a public school's exclusive instruction in evolution theory must be remedied through other measures, which do not entail the establishment clause problems associated with mandatory balanced treatment. One appropriate measure could be to exempt any individual student, who could make the necessary showings to establish a free exercise claim, from instruction in evolution theory that is not accompanied by instruction in creation theory. Such an exemption would directly affect only students with free exercise claims, rather than the student body as a whole, and would therefore cause significantly less inconvenience than a balanced treatment requirement. In addition to not being unduly expansive or inconvenient, an exemption remedy would probably not violate the establishment clause for any other reason either. It would certainly not have the purpose, and it would probably not have the effect, of conveying any message of school approval or disapproval of arguably religious beliefs.[353]

CONCLUSION

The recently escalating controversies concerning the inclusion in public school curricula of secular humanism or scientific creationism raise important broader issues: the scope of protection that should be afforded to a public school student's freedom of belief, and the extent to which the courts should intervene in curricular decisions to protect students' freedom of belief. Although the Supreme Court has authorized expansive judicial intervention in public school curricular decisions affecting students' freedom of religious belief, it has endorsed judicial deference to

352. *See supra* notes 297, 299.

353. An establishment clause violation could potentially result from an exemption policy if many students invoked the exemption, making their absence from class conspicuous. *See supra* note 292 and text accompanying note 329. However, teachers' explanations might well dispel any reasonable inferences that the school approved of arguably religious beliefs, which otherwise could arise in such a situation. If a court found that a particular exemption policy generated reasonable student perceptions of school approval of the exempted students' arguably religious beliefs, then an alternative accommodation policy would have to be devised. One possibility would be to require the teaching of evolution in a non-inculcative way. A teacher could fulfill this requirement by taking such steps as disclaiming any school disapproval of arguably religious beliefs inconsistent with evolutionary theory, and presenting scientific evidence weighing against the theory.

See also supra note 293 (regarding appropriateness of exemption as remedy for free exercise clause violation, even if some indirect social pressure might influence individuals asserting free exercise claim to forego exemption).

curricular decisions affecting students' freedom of non-religious belief. This Article proposes standards designed to narrow the gulf between these disparate approaches.

Because the special characteristics of public schools and their students make the students' freedom of belief both particularly fragile and particularly important, the Article proposes a relatively broad definition of those student beliefs to be accorded the greater degree of protection that the Supreme Court has so far granted to students' religious beliefs, but not to their non-religious beliefs. Specifically, the Article proposes that, at least in the special public school context, this higher degree of protection should be afforded to any arguably religious belief. The Article also suggests evidentiary guidelines for evaluating claims that curricular decisions violate students' rights under the religion clauses. The recommended guidelines chart a middle course between the prevailing judicial deference to curricular decisions affecting students' non-religious beliefs and the prevailing judicial strict scrutiny of curricular decisions affecting students' clearly religious beliefs. The suggested guidelines are thus designed to preserve a substantial measure of autonomy for state and local authorities in making educational policy decisions, while allowing courts to overturn any such decision that curbs students' freedom of belief within the arguably religious sphere.

As illustrated by applying the proposed standards to current controversies concerning secular humanism and scientific creationism, even if a curricular decision (for example, to use textbooks allegedly conveying principles of secular humanism, or to teach evolution without teaching creation theory) withstands establishment clause scrutiny, and hence may be imposed upon the student body as a whole, individual students with objections grounded in arguably religious beliefs may nevertheless be exempted from that decision under free exercise principles. Accordingly, the rights of individual students can be protected from curricular decisions substantially burdening their arguably religious beliefs while other students are simultaneously protected from curricular decisions tailored to any arguably religious belief.